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WOODLAWN UNION BAPTIST CHURCH, et al.,
Appellants,
v.
HAMILTON D. MARTIN, et al,
Appellees.

) APPEAL FROM
) THE CIRCUIT COURT
) OF COOK COUNTY.

306 I.A. 263

MR. PRESIDING JUSTICE MARK E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

A complaint in chancery was filed by the plaintiffs, officers and members of an unincorporated Baptist Church, against the defendants, seeking an injunction and other relief. The cause was tried by a chancellor without a jury, at which time a decree was entered in which the chancellor found the equities with the defendants and against plaintiffs.

The complaint alleges that Hamilton D. Martin was elected to the pastorate of the Woodlawn Union Baptist Church in 1931 and was re-elected each year thereafter up to and including 1937; that in 1938 when the church sought to elect the defendant Martin, and other officers for the year 1938, defendant Martin contended that he had been elected for life; that said defendant Martin has not been elected pastor of said church since December 1937, but has assumed the pastorate and leadership of the church over the protest and objections of its officers and members.

The trial court in entering its decree stated that the plaintiffs failed to sustain the material allegations of the complaint, and as heretofore stated entered a decree in favor of defendants, from which decree plaintiffs bring this appeal.

This court is asked to consider the merits of this case and in considering the order entered on June 19, 1939, we find that said order dismissing said suit was entered by consent and bears the following notation:

[illegible]

[illegible]

[illegible]

ENTER

O.K. [Signed] William H. Harrison. for Complainants. [Signed] John J. Crystalski Judge."

This consent is not set forth in the abstract.

Referring to the letters "O.K.", we find Webster's New International Dictionary, 1927, gives the following definition: ( * * "It is so and not otherwise) all right; 'O.K.'." Funk & Wagnalls New Standard Dictionary defines it as: "All correct * * * to sign as correct."

In Vol. 5 of "Words & Phrases Judicially Defined" at page 4871, appears the following:

> "'O.K.' means 'all correct.' The letters, indorsed by parties on the draft of a decree, were construed to mean a consent to the entry of the decree. Davis Paint Mfg. Co. v. Metzger Linseed Oil Co., 30 Ill. App. 117.
> 'O.K.' is an abbreviation which has a well-defined meaning, and signifies all right; correct; so that a decree on which counsel indorsed 'O.K.' is binding on the parties. Indianapolis, D. & W. Ry. Co. v. Sands, 33 N. E. 729, 734, 133 Ind. 433."

Bouvier's Law Dictionary, Vol. 3, p. 3328, defines "O.K." as follows:

> "O.K. These letters, followed by the signature of the person writing them, written on an order for goods, held sufficient contract to pay for them; Mann Tobacco Co. v. Lemen, 109 Ga. 428, 34 S. E. 679. Here 'O.K.' indorsements on bills by architects are sufficient compliance with provisions of contract for payments on their written certificates; Getchell & M. L. Co. v. Waterson, 134 Ia. 599, 100 N. W. 550. A stipulation waiving a jury filed in court, signed by counsel after the characters O.K., is an agreement; Citizens' Bank of Wichita v. Farrell, 56 Fed. 571, 6 C. C. A. 34."

As this court said in the case of Wright, et al. v. Watters, et al, 204 Ill. App. 398 [Not recorded in full]:

> "It has been held that the abbreviation 'O.K.' has a well defined meaning and signifies, 'all right,' 'correct;' the effect thereof being determined from the circumstances of the situation.
> In the case at bar, no objection was anywhere made to the entry of the said decree. Under the circumstances,

therefore, we are of the opinion, that counsel in approving the said decree intended that the notation 'O.K.' should indicate an unqualified assent, both as to the form and the propriety of its entry. Davis Paint Mfg. Co. v. Metzger Linseed Oil Co., 80 Ill. App. 117; I. D. & E. R. Co. v. Sands, 133 Ind. 433."

In practice the presentation of an O.K.'d order to a judge would relieve the latter of the necessity of any close supervision of its contents. Certainly, having joined in inducing the trial judge to sign the order, error cannot now be assigned because of said action by the trial judge.

In Sheridan v. City of Chicago, 175 Ill. 431, at page 435, said:

"The plaintiff in error cannot thus voluntarily enter his appearance and request the court to act, without presenting any objection to the court and without excepting to any action of the court, and then assign error and have an appellate tribunal review such action."

For the reasons herein given, the decree of the Circuit Court is affirmed.

[illegible] AFFIRMED.

HEBEL AND BURKE, JJ. [illegible].

3

therefore, [illegible] of the opinion, in a [illegible] in protecting the old decree [illegible] that the [illegible] should implement an unjustified result, [illegible] in the form and the propriety of its entry. [illegible] v. [illegible] Linseed Oil Co., [illegible] v. [illegible] Lumber Co., [illegible] v. [illegible]."

In protecting the [illegible] to a judge would relieve the [illegible] of its contents. [illegible] judge to sign the [illegible] and action by the trial [illegible].

In [illegible] v. [illegible], [illegible] said:

"The [illegible] reference on [illegible] any objection to the [illegible] to any action of the court, [illegible] appellate tribunal [illegible] action.

For the [illegible] Court of the District Court is affirmed.

[illegible]

41068

HOWARD K. MORSE,

Appellant,

v.

ASSOCIATION OF ARTS AND INDUSTRIES, a corporation,

Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

MR. PRESIDING JUSTICE WILL J. DICKMAN DELIVERED THE OPINION OF THE COURT.

306 I.A. 263

This is an appeal from a judgment entered in the Circuit Court in favor of the defendant non obstante veredicto, after a trial by court and jury, the jury having returned a verdict in favor of plaintiff for $5,000.00. Plaintiff Howard K. Morse brings this appeal.

It appears that the plaintiff at the time of the trial was a man 58 years of age, who, by profession, was a teacher of industrial art and design and made his living in this type of work and had for many years been connected with the Art Institute of Chicago, both in teaching and administrative capacities.

It further appears that the defendant, Association of Arts and Industries, was a corporate organization interested in the promotion of industrial art and design and that it was largely under the direction of Norma A. Stahle, its "executive director"; that the Association prior to 1932 had raised a considerable fund of money, which had been placed with the Art Institute of Chicago under an arrangement whereby the Institute conducted a school of industrial art and design; that the Association and its members were not satisfied with the conduct of the industrial art school at the Institute because it was too theoretical and was not practical enough and in May or June, 1935, the Association definitely decided to establish its own independent school and to withdraw its funds from the Institute; that about this time the executive director, Miss Stahle, approached plaintiff and asked him if he would be willing to resign his position

at the Art Institute and devote his time and services toward establishing a new school for the Association; that she promised that if he would do this plaintiff could have the position of dean or head of the new school when it was established; that plaintiff accepted the proposition and thereafter rendered many valuable services to the Association, including the preparation of written plans for the new school.

It further appears that in the early part of 1936, a few months after plaintiff had started to work on this project, he had an offer of a position in New Hampshire; that he thereupon wrote a letter to Col. Pelouze, the president of the Association, telling him of said offer and asking confirmation of the arrangement made with the executive director, namely, that Morse would be dean or head of the new school when it was opened; that Col. Pelouze told Morse over the telephone that he had turned this letter over to Norma K. Stahle, the executive director.

It further appears that shortly thereafter plaintiff received a letter on the letterhead of the Association, signed by Norma K. Stahle, which letter confirmed the understanding that Morse was to be the head of the new school when it was opened and requested him to continue his work to this end.

Col. Pelouze did not testify at the trial. Miss Stahle testified she saw the letter to Col. Pelouze.

The record further shows that Miss Stahle asked Morse to return the letter which she had written to him; that Morse gave the letter to Miss Stahle, who destroyed it. The testimony presented at the trial also showed that she destroyed the office copy of said letter and the defendant claimed that Morse's original letter to Col. Pelouze was lost and could not be produced at the trial.

It further appears that in January, 1936, Marshall Field III gave to the Association the property at 1305 Prairie avenue, to be used for a school building; that plaintiff had a desk there by

[illegible]

arrangement with the Association while he was drawing up some plans for remodeling the building and doing miscellaneous services.

It further appears that the Association appointed a School Committee to take charge of matters dealing with the establishment of the new school; that at a meeting of this committee on March 7, 1936, plaintiff made a report and submitted a plan which was approved by the committee and recommended for adoption to the Board of Directors of the Association.

It further appears that at a meeting of the Board of Directors held March 27, 1936, the recommendations of the School Committee which were made at the meeting of March 7, 1936, were approved and plaintiff's plans were approved, and Miss Stable was authorized to make temporary arrangements with Morse to become head of the school; that on March 5, 1937, the directors requested Morse to inspect the Field House.

The minutes of the Executive Committee meeting held May 7, 1937, show that Morse was requested to prepare a booklet.

On May 23, 1937, Hayes, the vice-president, wrote Morse a letter in which he told Morse to do nothing further.

The minutes of the Executive Committee meeting held May 26, 1937, show that Hayes, the vice-president, reported he had made a verbal agreement with Morse at $225 per month beginning May 15, 1937, to October 1, 1937, and $3,600 per year beginning October 1, 1937, as dean of the school.

The evidence further shows that prior to the Director's Meeting of June 18, 1937, and shortly after Morse had made the salary arrangement with Hayes, the officers of the Association were carrying on negotiations to bring in Moholy-Nagy as head of the school.

About August 17, 1937, Hayes, the vice-president, called Morse to his office and told him the Association had hired Moholy-Nagy as head of the school and that since Moholy-Nagy would choose his

arrangement with the Association which on the [illegible] of some plans for remodelling the building and taking alterations matters.

It further appears that the committee appointed a school committee to take charge of matters dealing with the advancement of the new school; that at a meeting of this committee on March 7, 1926, similarly were [illegible] and submitted [illegible] by the committee and recommended [illegible] of the Association.

It further appears that at a meeting of the board of directors held March 7, 1926, the recommendations of the school committee which were [illegible] March 7, 1926, were approved and similarly [illegible] was authorized to make [illegible] of the school to become head to lease the field house.

The minutes of the [illegible] 1927, show that notice was [illegible] on file.

On May 26, 1927, [illegible], the vice-president, read [illegible] letter in which he said [illegible] of them.

The minutes of the [illegible] 1927, show that there, the [illegible] a verbal agreement with [illegible] to October 1, 1927, [illegible] to lease of the school.

The minutes further [illegible] meeting of June 13, 1927, [illegible] arrangement with [illegible] on negotiations to bring in [illegible] of the school.

[illegible] June 17, 1927, [illegible] notice to his attorney [illegible] as head of the school [illegible] is [illegible]

own staff, Morse was through. Morse expressed his disappointment and surprise but offered to co-operate in some other position, but nothing ever developed.

In October, 1937, the new school, known as the New Bauhaus-American School of Design, at 1205 Prairie avenue opened with Moholy-Nagy as dean or head.

Morse held himself ready, willing and able to assume the duties and position of dean or head of the school but the Association did not employ him in any capacity.

On November [illegible], 1937, the Association sent Morse a check for $325 dated October 20, 1937, purportedly in settlement of Morse's claim. Morse returned the check with a letter dated November 17, 1937, notifying the Association that the check was wholly insufficient and that he would not accept it.

During the period from May, 1935, to August 17, 1937, approximately two and one-quarter years, Morse was rendering valuable services to the Association and had no other position.

The testimony of competent witnesses, experienced in the same field of work, was to the effect that the services rendered by Morse over a period of two and one-quarter years were worth the fair and reasonable value of from $10,000 to $12,000. Morse testified that his services were worth a similar sum. The evidence showed that Morse had earned $3,750 a year at the Art Institute and that $4,200 a year had been placed in the budget of the new school for his position and that Hayes had agreed to pay him $300 a month beginning October 1, 1937; that Moholy-Nagy, the man who was finally employed as dean of the school, was given $8,400 to $10,000 per year; that Morse earned $8.35 a day or $165 per month as a substitute teacher at the Chicago Teachers College which is a unit of the Chicago Public School system.

The evidence as to whether or not plaintiff's services were satisfactory is conflicting. Morse testified that no criticism

or complaints were ever made to him and Hayes claimed that Morse's services in certain respects were unsatisfactory. The minutes of the School Committee meeting show that Hayes approved Morse's plans and even seconded the motion recommending them to the Board of Directors. Hayes further testified that he complained to Morse about his work, but a letter written to Morse by Hayes on July 1, 1937, makes no criticism of Morse's work whatsoever. Wilhenning, the treasurer of the defendant, said he heard no criticism of Morse. Gilbert Rhode, a national authority, approved Morse's plans.

The trial of this case consumed three days and at the close of the evidence was submitted to a jury who returned a verdict in favor of plaintiff for $3,000. Thereafter, on motion of the defendant, the trial court granted defendant a judgment notwithstanding the verdict. Plaintiff appeals from the trial court's ruling and judgment.

The theory of the defense is that the plaintiff has no right to recover on a quantum meruit basis. It is claimed that the plaintiff, himself, had no thought or intention of charging for the services which he claims to have rendered for the defendant from time to time and that he cannot after the lapse of a long period of time and because of subsequent animosity toward defendant change his mind entirely and recover from a defendant who, at no time, had reason to believe that the plaintiff expected to be paid for his alleged services; that defendant's defense to plaintiff's theory - that while he did not expect to be paid in money for his services, he did expect to be rewarded by an appointment to head the school which the defendant hoped to organize - is the very patent fact that the plaintiff was given the position which he desired, under a contract made on May 8, 1937; that plaintiff does not base his claims in this case upon a breach of the contract of May 8, 1937, but seeks to recover on the contract or contracts alleged in the complaint; that the question, therefore, presented in this case is whether or not the plaintiff has

or complaints were over [illegible] in [illegible]
services in certain respects [illegible] judicial [illegible]. The division of
the school [illegible] [illegible]
and even exceeded the [illegible] time to the [illegible] of
directors. A few [illegible] [illegible] to [illegible]
about his work, but [illegible] [illegible] [illegible] 1977,
makes no criticism of [illegible] [illegible]. [illegible], the
treasurer of the [illegible]. [illegible]
Gilbert Moore, [illegible] [illegible].

The trial of [illegible] [illegible]
of the evidence [illegible] [illegible] [illegible]
favor of [illegible] [illegible] [illegible]
the trial court [illegible] [illegible] [illegible]
verdict. [illegible] [illegible]

The theory of [illegible]
right to recover on [illegible] [illegible]
[illegible], himself, [illegible] [illegible]
[illegible] which he [illegible] [illegible]
to time and [illegible] [illegible]
and [illegible] [illegible]
entirely and [illegible] [illegible]
believe in [illegible] [illegible]
the [illegible] [illegible]
not [illegible] [illegible]
[illegible] by [illegible]
[illegible]
given the [illegible]
1977; [illegible]
[illegible] of the [illegible]
[illegible] of [illegible]
therefore, [illegible]

established a contract with the defendant covering a period from June, 1935, up to the time all relations were severed.

An important question presents itself as to whether or not the plaintiff at the times set forth in his complaint dealt with any person representing the defendant who had power and authority to bind the defendant by either an express or an implied contract such as is alleged in the plaintiff's complaint. We think the evidence shows that plaintiff was employed by defendant.

It is further claimed on behalf of the defendant that the evidence itself does not show that the defendant is a competent teacher or that he ever taught industrial art.

It is further claimed by defendant that on March 27, 1936, a resolution was adopted by the Board of Directors to the effect "that Miss Stahle be authorized to make temporary arrangements with Mr. Morse for him to become the head of the school when and if we secure the funds". The evidence shows that although he worked for defendant, another person was appointed to the position as agreed.

One of the most important phases of this case is that there was considerable contradictory evidence presented by the parties and, without extending to undue length the details of the testimony presented at the trial, suffice it to say that we think this case was a typical case for the consideration of a jury, and it was not a case wherein the judgment of the trial court should have been substituted for the finding of a jury. We further believe that the jury did rightfully arrive at the verdict which it returned.

In Mirich v. Forschner Contracting Co., 319 Ill. 347, the court at pages 355 and 356, said:

> "It must, we think, be accepted as settled law that a trial court has no power, when a jury is not waived, to determine the weight and preponderance of conflicting evidence introduced to establish or disprove the facts. The decisions are numerous,

established a contract with the essential consulting [illegible] from June, 1955, up to the time [illegible] relations were severed.

An important question [illegible] not the plaintiff at the time not [illegible] any person representing the defendant who [illegible] to bind the defendant by [illegible] is alleged in the [illegible] point. [illegible] the evidence shows that liability was [illegible] by estoppel.

It is further claimed on behalf of the defendant that the evidence itself does not show [illegible] weather or not it be ever a valid [illegible].

It is further claimed [illegible] 1956, a resolution was adopted by [illegible] be the effect that [illegible] for him to assume the [illegible] when, if we assume the truth". The evidence shows that although [illegible] to be [illegible], another person was [illegible] the building [illegible].

One of the more important [illegible] is that there was considerable conflicting evidence presented by the parties and, without extending [illegible] the validity of the testimony presented at the trial, suffice it to say [illegible] that this was not a typical case for the [illegible] and it was not a case wherein the judgment of the [illegible] for the finding of the jury. [illegible] rulings [illegible] slightly [illegible] the evidence which it [illegible].

In [illegible] v. [illegible], [illegible], the court at [illegible] [illegible]:

"It must be [illegible] the [illegible] trial court has [illegible] the weight and [illegible] of conflicting evidence [illegible] to substitute [illegible] for [illegible] the [illegible].

and are uniform, that the trial judge is never authorized to take a case from the jury where there is legitimate evidence tending to prove the cause of action. " " " It has always been recognized that for a trial court to weigh and determine conflicting evidence and direct the jury what verdict to render would be a direct violation of the constitutional rights of trial by jury."

In the case of Schelll v. Harrison & Sons, Inc., 286 Ill. App. 130, the court at page 138, said:

"The statute and rules require the court to be governed by the same rules in passing upon a motion for a judgment notwithstanding the verdict as govern it in passing upon a motion for a directed verdict. The trial court in passing upon this motion has no more authority to weigh and determine controverted questions of fact under the Civil Practice Act than under the Practice Act of 1907. Illinois Tuberculosis Ass'n. v. Springfield Marine Bank, 283 Ill. App. 14; Capelle v. Chicago & N. W. Ry. Co., 280 Ill. App. 471." See also Chicago Title and Trust Co. v. Sleary, 286 Ill. App. 97; Boyds Dairy Co. v. Continental Casualty Co., 309 Ill. App. 469.

It is further contended by the defendant that the plaintiff is not entitled to recover upon a quantum meruit, in view of the fact that plaintiff contended that he had a specific contract for the services which he performed. Granting there was a specific contract, the Supreme Court, in the case of Lake Shore and Michigan Southern Ry. Co. v. Richards, 152 Ill. 59, at page 80 of its opinion, said:

"It is well settled that where one party repudiates the contract and refuses longer to be bound by it, the injured party has an election to pursue either of three remedies: He may treat the contract as rescinded, and recover upon quantum meruit so far as he has performed; or he may keep the contract alive for the benefit of both parties, being at all times himself ready and able to perform, and at the end of the time specified in the contract for performance, sue and recover, under the contract;or he may treat the repudiation as putting an end to the contract for all purposes of performance, and sue for the profits he would have realized if he had not been prevented from performing."

In the case of Bunge, et al. v. Berwyn Grove Sanitary District, 356 Ill. 531, the Supreme Court held that where the defendant refused to permit attorneys to complete certain special assessment work under an express contract, the plaintiffs could treat the contract as rescinded and recover on a quantum meruit. The court said at page 537:

"Defendant having repudiated its contracts with plaintiffs, they were entitled to treat the contracts as rescinded and recover upon a quantum meruit so far as they had performed."

[illegible] are uniform, and if the trial judge [illegible] authorized to take a case from the jury [illegible] are [illegible] to prove the cause of action. [illegible] that for a trial court [illegible] and direct the jury that verdict [illegible] violation of the [illegible].

In the case [illegible], [illegible], App. 180, the court [illegible]:

"The statute [illegible] some minor [illegible] the verdict as [illegible] verdict. The trial [illegible] authority to [illegible] under the civil [illegible] Illinois [illegible] v. [illegible] 40. In [illegible] v. [illegible] see also [illegible] North [illegible]."

It is [illegible] is not entitled [illegible] that [illegible] statutes [illegible] the Supreme [illegible] v. [illegible]:

"It is not [illegible] contract [illegible] man on [illegible] street [illegible] no [illegible] for the [illegible] reply [illegible] in the [illegible] contention [illegible] the contract [illegible] notice [illegible] from [illegible]."

[illegible] Nation, [illegible] [illegible] to [illegible] work under [illegible] to [illegible] [illegible]:

"[illegible] were entitled to [illegible] which [illegible]

In defendant's conclusion, as set forth in its brief, it contends:

> "If the trial court refused to enter a judgment non obstante veredicto, he would certainly have felt compelled to grant a new trial in the case."

Such question is not before us at this time and we are not required under the law to weigh the evidence for the purpose of determining what might or might not happen in the future.

This court is convinced that the plaintiff made out a case by the evidence which justified the jury in returning the verdict which it did, and we believe the court committed error in substituting its judgment for that of the jury. The trial judge should have entered a judgment on the verdict and, he having failed to do so, this court, under the statute, is obliged to reverse the judgment of the trial court and enter judgment here on the verdict of the jury for the sum of $5,000 in favor of plaintiff and against defendant, as provided for in said verdict, at defendant's costs.

JUDGMENT REVERSED AND JUDGMENT HERE FOR $5,000 FOR PLAINTIFF AND AGAINST DEFENDANT.

HEBEL, J. CONCURS.

BURKE, J. DISSENTING:

The plaintiff did not make out a case and the court was right in entering a judgment non obstante veredicto.

in defendant's possession, [illegible] in this case, it contended:

"If the trial court [illegible] instructed the jury that **absolute certainty** in such matters [illegible] to first [illegible]."

Such question is not before us. [illegible] under the law to which the evidence [illegible] what might or might not happen in the future.

This court in [illegible] by the evidence which justified [illegible] which it did, and [illegible] its judgment for that of the jury. [illegible] substituted a judgment on the weight [illegible] this court, under [illegible] of the trial court [illegible] jury for the sum of $[illegible] [illegible] as warranted for in [illegible] right in entering a judgment [illegible]

[illegible]

[illegible]

[illegible]

[illegible]

41096

In the Matter of THE ESTATE OF CHARLES W. BUMP, Deceased,

LAURA GEORGE WATSON,

Appellee,

v.

EDWARD W. MONROE,

Appellant.

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ILLINOIS

CIRCUIT COURT

COOK COUNTY.

MR. PRESIDING JUSTICE MARK A. SCHWEN DELIVERED THE

OPINION OF THE COURT.

306 I.A. 264

This is an appeal from an order entered in the Circuit Court when this cause came before it on an appeal from the Probate Court relative to the removal and appointment of executors in the above named estate.

It appears that Charles W. Bump died on May 28, 1937, and that his wife had died prior thereto; that Laura George Watson, one of the executors named in his will, had been living with Bump prior to his death, and after his demise it developed that the said Laura George Watson had possessed herself of real estate located at 5553 Magnolia avenue, which had belonged to the said Bump and which it is alleged was worth many thousands of dollars; that the said Laura George Watson had also taken possession of all the safety deposit boxes of the estate.

It also appears that Edward W. Monroe had had dealings with Charles W. Bump during his lifetime as they were interested in the manufacture of a chair called the Osteovitalizer; that Monroe had been named as one of the executors of the Charles W. Bump Estate, and naturally said Monroe would have a personal interest in the administration of the estate which would necessarily be adverse to his position as an executor, which would also be true with regard to Laura George Watson.

Considerable effort has been put forth by counsel in an endeavor to establish the fact as to whether or not Monroe was a resident of Illinois or of Michigan and as to the provisions of

the statute regarding the appointment of an administrator de bonis non.

When this cause was before the Probate Court that court was confronted with three belligerent executors, each trying to remove the others, and two of them at least, having adverse interests in the estate. The statute regarding the removal of executors does appear to be prohibitory with regard to removing executors and appointing an administrator as long as all the executors have not been disqualified. It must be borne in mind, however, that this statute was passed for the benefit of the estates and to aid in the administration of justice and not for the purpose of giving any executor any property rights in an estate. Although the Probate Court may have been technically incorrect, yet we feel that substantial justice was done when the court removed all of them. However, an appeal was taken from that order to the Circuit Court at which time the whole matter came up de novo. Laura George Watson did not appeal to the Circuit Court or file a bond, consequently, the order of removal as to her is final. No charge was made against Garfield Thompson in the Probate Court nor was any charge made as to him in the Circuit Court, Consequently, so far as we are able to determine in deference to the wishes of the deceased, the said Thompson should remain as executor.

Having reviewed the entire record, we are of the opinion that the trial court did right in finding that the charge made that Monroe was a non-resident, is true and that he was not entitled under the statute to be an executor in the first instance. We think the appointment of the Metropolitan Trust Company as administrator was in violation of the statute and for that reason it cannot be approved; that the Circuit Court was right in entering its order.

For the reasons herein given the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

REBEL AND BURKE, JJ. CONCUR.

41168

JOSEPH [illegible],
Appellant,
v.
RAYMOND HOVELLO and [illegible],
Appellees.

[illegible] COURT
[illegible] DISTRICT
[illegible] ILLINOIS.

306 I.A. 264

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

On May 25, 1938, in a statement of claim filed in the Municipal Court of Chicago, plaintiff averred that he was at all relevant times a duly licensed real estate broker, doing business in Chicago; that defendants were the owners of the real estate known as 2804 South Wallace Street, Chicago; that defendants engaged him as a broker to procure a purchaser for the premises at a price of $3,800; that on or about March [illegible], 1938, he procured Vincenzo Galluzzo and Caterina Galluzzo as purchasers; that on that day the Galluzzos and defendants entered into a valid written contract for the sale of the premises, by the terms of which defendants agreed to pay him $300 as a real estate commission for his services; that the Galluzzos were ready, willing and able to buy the property for the sum of $3,800; that the defendants, although requested so to do, failed to pay him the $300 commission so earned; that the commission for such a sale, according to the schedule established by the Chicago Real Estate Board, is 5% of the amount of the sale, and he asked damages in the sum of $300. In an affidavit of merits the defendants denied that they engaged the plaintiff to procure a purchaser; asserted that they listed the premises for sale with a real estate broker other than plaintiff, and that such broker, brought the Galluzzos to them; alleged that in listing the property for sale they asked a purchase price of $4,300; that thereafter plaintiff approached them with a proposition to sell the premises to the Galluzzos for $3,800; that the defendants agreed to take such sum, provided the sum was paid in cash and they received the full purchase price without any deductions for commission; that neither

JOSEPH [illegible],

[illegible]

v.

[illegible]

[illegible]

306 I.A. 294

MR. JUSTICE [illegible]

On May 19, 1959, [illegible]

municipal court of Dakoro, [illegible]

relevant items a duly licensed [illegible]

Niamey; the defendants [illegible]

as DDOA South Africa [illegible]

as a means to produce [illegible]

2,800; that on or about [illegible]

Dallmann and Dieterle filmed [illegible]

Dallmann and Dieterle [illegible]

the main of the operation, [illegible]

to pay him [illegible]

the Dallmann was [illegible]

for the sum of 2,800; [illegible]

to do, failed to pay him [illegible]

commission for such [illegible]

by the chiefs [illegible]

and he asked [illegible]

the defendants denied [illegible]

purchaser; asserted that [illegible]

real estate broker [illegible]

brought the [illegible]

for this [illegible]

[illegible]

the allusion for 2,800; [illegible]

sum, provided the sum was [illegible]

purchase price without [illegible]

of the defendants can read or write English; that they signed the contract without the same having been read to them and without being advised by anyone that the contract contained a provision for the payment by them of a commission for [illegible]; that they did not agree to pay any commission; that their agreement was to sell the property for $3,800 net to them; that plaintiff perpetrated a fraud on them in inserting a clause in the contract for the payment of [illegible]; that after they learned of such provision they refused to carry out the terms of the contract, unless the contract was altered to conform to their understanding. The cause was tried before the court without a jury. He found the issues for the defendants and against the plaintiff, and entered judgment for costs, to reverse which the plaintiff prosecutes this appeal.

Plaintiff's theory is that he earned a commission upon the execution of the contract of either the [illegible] provided for in the contract, or under an implied contract to pay a reasonable amount; that defendants refusal to complete the deal was not because of anything done or omitted by the purchasers, but solely because defendants did not want to pay a commission on the sale; that the defendants knew the details of the contract and that the contract reflects the true agreement between the parties. Defendants did not file an appearance in this court. Plaintiff asserts that defendants' theory is that they had no arrangement to pay the plaintiff any commission at all, and that their understanding was that they were to receive a purchase price of $3,800 net to them. Plaintiff asserts that a broker earns his commission when he procures the seller and purchaser to enter into a binding contract. This is the correct statement of a general rule. However, if the understanding between the parties was that the defendants should receive $3,800 net to them and not pay any commission, it is obvious that defendants could not be required to pay a commission. Plaintiff's brief is largely a discussion of the facts in an endeavor to show that the court erred in not entering judgment for him and against the defendants. Therefore, it is

of the defendants [illegible] in this instance; if a jury signed the contract without the [illegible] to [illegible] without being advised by anyone that the material contained [illegible] for the payment by them of a commission for [illegible] it not agree to pay any commission; that [illegible] the property for $3,000 net to them; that [illegible] on them in inserting a clause in the contract [illegible]; that after they learned of such [illegible] they [illegible] met the terms of the contract, unless the contract [illegible] to their understanding. [illegible] without a jury. He found the issues for the [illegible] that the plaintiff, and entered judgment [illegible] the plaintiff; [illegible] this appeal.

Plaintiffs [illegible] consideration upon the execution of the [illegible] in the contract, or under [illegible] amount; that defendants [illegible] of any [illegible] thing done or [illegible] defendants did not want to pay a commission [illegible] defendant knew the details of the [illegible] defendants reflects the true agreement between the [illegible] in appearance in this [illegible] theory is that they [illegible] at all, and that [illegible] a purchase price [illegible] broker earns his commission [illegible] to enter into a [illegible] a general rule. However, [illegible] was that the [illegible] any commission, it is [illegible] to pay a commission. [illegible] the facts in an [illegible] judgment for the [illegible] in not entering [illegible] it is

necessary for us to briefly summarize the testimony.

The parties admitted that the contract was signed and that plaintiff was a duly licensed broker. Plaintiff testified that Raymond Novello came to his office and listed the property for sale; that plaintiff contacted the prospective purchasers, the Galluzzos; that plaintiff's son Frank accompanied the Galluzzos for the purpose of inspecting the property; that the prospective purchasers inspected the property twice; that Mr. Novello came to plaintiff's office; that witness informed Novello that if the property was sold through plaintiff's efforts as a broker for $4,000 or less, his commission would be $200; that he, plaintiff, informed Novello that the purchaser would pay $3,800, and that he, Novello, wanted $200 as a commission; that Novello then endeavored to persuade him to take $10 off, which plaintiff declined to do; that thereupon plaintiff signed the contract, and that he, witness, did not receive the commission; that the deal did not finally go through and that there is a specific performance suit pending. On cross-examination, plaintiff testified that the contract was first signed by Raymond Novello, and that his wife, Mary Novello, was not present at that time; that defendant brought his wife in a week later; that at the time the husband signed the contract he gave him a copy thereof; that when he brought his wife in a week later Novello told the witness that his wife did not want to sign; that when she finally came to the office she also insisted that he deduct $10 from his claimed commission of $200 and that he declined so to do, and that she said: "All right, I'll sign." He further testified that he talked in Italian to the defendants and that he knew at the time they signed the contract that the defendants could not read or write English; that he gave a copy of the contract to the husband and suggested that the defendants consult a lawyer. Frank S. Caccistore, a son of the plaintiff, testified that he was a real estate salesman in the employ of his father; that the property

necessary for us to briefly summarize the testimony.

The parties [illegible] and that plaintiff was a [illegible] tenant. [illegible] that Raymond Novelle [illegible] that plaintiff [illegible] that plaintiff [illegible] of insecticide [illegible] the property [illegible] that witness [illegible] plaintiff's [illegible] would be [illegible] would pay [illegible] that Novelle [illegible] plaintiff [illegible] and that he [illegible] did not [illegible] suit penalty [illegible] contract [illegible] day [illegible] his wife in [illegible] contract [illegible] in a week [illegible] to stay [illegible] that he [illegible] declined [illegible] further [illegible] that he [illegible] could not [illegible] to the [illegible] from [illegible] a real estate [illegible]

was listed on cards in their office; th t on two different occasions he showed the property to the prospective purchasers; th t he delivered a copy of the contract to Mrs. Novello and told her to exhibit it to her attorney; th t a week later she came to the office and signed the contract; th t he was present at the time of the conversation concerning the commission, and th t Mr. Novello wanted to cut their commission and th t after plaintiff declined to do so Novello st ted th t he would sign. Witness also testified that he heard his f ther explain that the purchase price was $3,800 cash. He also stated th t the established commission according to the schedule of the Chicago Real Estate Board is 5%, which would be $190, and that the amount of $200 was fixed so as to bring it to "round figures". Raymond Notolo, a witness for plaintiff, testified that he was an uncle of the prospective purchaser, Vincent Pelluzzo, who was too ill to appear in court, and th t Pelluzzo possessed the funds with which to make the purchase. The defendant Raymond Novello testified that he did not list the property with plaintiff, nor did he ask plaintiff to sell it; th t plaintiff's son brought the prospective purchasers to the property; that witness asked the sum of $4,500; that thereafter he went to plaintiff's office; th t he could not bring his wife because she was ill; th t he agreed to accept a price of $3,800 net; that he signed the contract which he described as a piece of paper; that he then asked for the $200 deposit, and that plaintiff informed him that he could not have the $200 deposit until his wife also signed; that plaintiff did not give him a copy of the contract; that plaintiff informed him he would give him a copy of the contract and the $200 deposit when Mrs. Novello signed the contract; that a week later he brought his wife to plaintiff's office and that she signed the contract; that he then again asked for the $200 deposit; that plaintiff said: "Oh, no, that's all you got to do. Another week we are going to close the deal, bring all the papers you got home, and another week are going to get the $3800 in cash, all in your hands;"

that witness and his wife stated they wanted the $200 deposit then or they would not make the deal; that plaintiff replied that he would sue them. Witness further testified that the plaintiff did not read the contract to him either in English or Italian; that plaintiff's son came to his house for the purpose of inducing his wife to sign the contract, but did not leave a copy of the contract, and that he did not agree to pay plaintiff a commission; that witness stated "I asked him I want clear money, and he say to me he give me $3,800 clear money"; that he cannot read English; that at the time the wife came to plaintiff's office to sign the contract, the contract was not read to them; that after the contract was signed by Mrs. Covello, witness received a copy of it; that he took the copy of the contract to a real estate man who lived in the neighborhood, who read it to him; that it was then for the first time he learned that there was a provision in the contract for the payment of a real estate commission; that because of such provision he refused to go through with the contract. On cross-examination, he testified that he knew plaintiff for three or four years; that he did not know plaintiff was in the real estate business; that plaintiff offered him $3,800 net cash for the premises; that he was satisfied to sell the property for $3,800 net. The testimony of defendant Mary Covello tended to corroborate the testimony of her husband.

The trial judge had an opportunity to view and hear the witnesses. It was for him to decide on their credibility and the weight to be given to their testimony. In the testimony of the defendants there is a constant reiteration of their contention that under the deal which they were making, they were to receive the sum of $3,800 "net". If they had to pay $200 to plaintiff they would not be receiving $3,800. We are of the opinion that the record presents purely a question of fact. The trial court resolved the conflict in the testimony in favor of defendants. Without the advantage of seeing and hearing

that witness and his wife stated they signed the two documents when or they would not make the deal; in a similar manner that he would sue them. Witness further testified [illegible] did not read the contract to his wife or [illegible] that plaintiff's son came to his house for the purpose of inducing his wife to sign the contract, but did not leave a copy of the contract, and that he did not agree to pay plaintiff's commission; in a different stated if asked him [illegible] money. [illegible] clear money; but at no time [illegible] came to plaintiff's office to sign the contract. [illegible] read to them; that the contract [illegible] witness received a copy of it; that he [illegible] to a real estate [illegible] neighborhood. [illegible] that it was been for the first time [illegible] violation in the contract for the payment [illegible] that because of such violation he refused to [illegible] contract. On cross-examination, he [illegible] for three or four years, in a [illegible] in the real estate business; [illegible] the premises; [illegible] not. The testimony of [illegible] the testimony of her husband.

The trial Judge [illegible] witnesses. [illegible] to be given to their testimony. [illegible] there is a conflict [illegible] which they were asking. They [illegible] If they had [illegible] $2,800. [illegible] tion of fact. The trial court [illegible] in favor of [illegible]

the witnesses, we would not be warranted in disturbing the finding.

For the reasons stated, the finding and judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

DENIS E. SULLIVAN, P.J. AND HEBEL, J. CONCUR.

41165

FIRESTONE TIRE AND RUBBER COMPANY,
a corporation,

Plaintiff - appellee,

v.

ROBERT H. McELROY, JR., MURRAY [illegible]
and A. H. VAN NESS,

Defendants.

On Appeal of ROBERT H. McELROY, JR.,

Defendant - appellant.

APPEAL FROM

[illegible] DISTRICT COURT

[illegible] COUNTY.

306 I.A. 265

MR. JUSTICE MESER DELIVERED THE OPINION OF THE COURT.

This is an appeal by appellant, Robert H. McElroy, from an order entered by the court sustaining the motion of plaintiff to quash a writ of certiorari, theretofore issued by the court on July 6, 1939. The petition, of appellant, for writ of certiorari was filed on July 5, 1939, from which it appears that the Firestone Tire and Rubber Company, a corporation, on the 3rd day of February, 1939, commenced an action against the petitioner and E. F. Wolf and A. H. Van Ness, before one Willis J. Wrightmire, one of the Justices of the Peace in and for the County of Cook, to recover the sum of $118.47, alleged to be due from the petitioner and the said E. F. Wolf and A. H. Van Ness to the Firestone Tire and Rubber Company, for goods alleged to have been sold and delivered to the said defendants, and that on March 17, 1939, the said Justice rendered a judgment against the petitioner and E. F. Wolf in that action for the sum of $118.47, and costs of suit. On April 10, 1939, execution was issued on the judgment and placed in the hands of a constable for service and was served on petitioner on April 15, 1939.

It further appears from the petition that petitioner denies that he was at the time of the commencement of the action, nor was he at the time of filing the petition, indebted to the Firestone Tire and Rubber Company; and states the fact to be that E. F. Wolf created said alleged indebtedness solely on his own account and not in behalf of petitioner; that petitioner did not contract said

FIREHOUSE 1123 AND ENGINE COMPANY,
a corporation,

Plaintiff - Appellee,

v.

ROBERT D. [illegible], Jr., [illegible],
and A. M. [illegible],

Defendants.

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On Appeal of [illegible] J. [illegible],

Defendant - Appellant.

[illegible]

Mr. [illegible]

This is an [illegible] action, [illegible], to review, from an order entered by the [illegible] District Court [illegible] to quash a writ of certiorari, [illegible] on the 8th of July 8, 1924. [illegible] the writ was filed [illegible] Fire and [illegible] Company, [illegible] 1924, commenced [illegible] J. M. von [illegible] of the [illegible] 1118.47, [illegible] not and [illegible] for good [illegible] defendants, [illegible] a judgment against [illegible] for the sum of 1118.47, [illegible] execution [illegible] constable for [illegible]

It further [illegible] that he was [illegible] he at the time of filing [illegible] Fire and Rescue [illegible] not in behalf of [illegible]

alleged indebtedness, nor did he ever assume or agree to pay said alleged indebtedness, or any part thereof; that E. E. Wolf did not contract said alleged indebtedness on behalf of or for or on account of petitioner or as agent of petitioner; and that the judgment, as to petitioner, is unjust and erroneous.

Petitioner further states that one J. S. Barber, Attorney for plaintiff, informed and promised petitioner, prior to March 17, 1939, that when said cause would come on for hearing before the said Willis H. Brightmire, Justice of the Peace, said cause would be continued to enable petitioner to appear and defend; that on plaintiff's motion, the hearing on said cause would be continued and reset and that notice of the date and time of the hearing would be given to petitioner, but notwithstanding said promise, and without informing petitioner of the date to which said cause had been continued, and without any notice a default was taken on the date to which the cause had been continued and reset, on, to-wit, March 17, 1939, and judgment entered against petitioner in the amount aforesaid; that petitioner was not apprised of the entry of judgment until more than 30 days after the rendition thereof, and after execution on said judgment had been served upon him, on to-wit, April 10, 1939; that petitioner could not take an appeal from said judgment and that he was in no way negligent in the protection of his rights; and prays a writ of certiorari to issue according to the form of the statute in such case made and provided.

Thereafter, on July 5, 1939, the court entered an order that upon the filing by petitioner of a good and sufficient bond in the sum of Two Hundred and Fifty ($250.00) Dollars, conditioned according to law, which said bond to be approved by the clerk of the court, that thereupon a writ of certiorari issue out of the court to one Willis H. Brightmire, Justice of the Peace, Firestone Tire and Rubber Company and Emrey E. Wolf.

A motion to quash writ of certiorari was filed by plaintiff, by James G. Barber, its attorney, on August 8, 1939, and to dismiss the petition of petitioner for said writ of certiorari, and for grounds of its said motion, set forth the following: (1) The transcript returned by the Justice and the facts alleged in the petition do not show that the Justice exceeded his jurisdiction or proceeded illegally, (2) The petition on its face shows that the judgment was the result of the petitioner's negligence, (3) By return of said Justice, it does not appear that said Justice has committed any error in law, and (4) Facts appearing on the face of the petition in said cause do not authorize the issuing of writ of certiorari. The court, after due notice had been given to all persons entitled thereto, and after hearing arguments of counsel, ordered that the motion to quash the writ of certiorari issued herein be and the same is hereby sustained and petitioner to pay costs. As we have indicated, it is from this order that defendant, Robert H. McElroy, Jr., appeals to this court.

The first contention that is called to the attention of this court is a statement made by defendant that a layman is entitled to rely upon the word of an attorney that a case would be continued to allow the defendant to appear and defend and that notice of the time and place would be given him, because an attorney at law occupies an unique position with regard to the general public.

When we consider the petition, we find that from the transcript of the proceedings before the Justice of the Peace, filed in the cause, that on March 17, 1934, when the case was called the defendants did not appear, and after due consideration and upon the expiration of one hour of time from the time the case was first called, the case was called again and defendants did not appear; that witnesses were sworn and examined and judgment entered for the amount stated in the petition. It further appears from the petitioner's statement of facts in the case that the cause was continued and reset, so that the cause was called for a hearing on March 17, 1939, and judgment entered for the amount that the plaintiff claimed was due.

It seems, from the defendant's own statement of facts that the case was continued to March 17, 1939, at which time the cause was heard and judgment entered.

It does not appear from anything in the petition that the defendant ever made an effort or investigation to find the time to which the case was reset, by either examining the docket of the Justice of the Peace or by calling upon the lawyer to ascertain when his case was set for trial. It is to be noted further that there was nothing done by him between the time judgment was entered and the date when execution was served on him, or within the 30 days allowed for an appeal, but rather, from his petition it appears that he did not make any effort to ascertain whether the cause was continued or whether a judgment had been entered, and from his petition states that the first time that he knew that a judgment had been entered was when an execution was served upon him on April 15, 1939, which was more than 30 days after the judgment. When we consider the facts as stated in the petition we find that this defendant was negligent in failing to ascertain the date upon which the case was reset for trial. It was necessary for the petitioner to show by the facts stated in his petition that he was diligent in asserting his rights and that the judgment was not the result of his negligence.

In the case of Reilly v. Prince, 37 Ill. App. 102, which involved a petition for certiorari, the court said:

> "When a party is sued as well as when he brings an action, he is bound to attend to the proceeding through all its stages, and if he omits to do so, he must abide the consequences of his inattention * * *".

We have already indicated that the petitioner does not appear to have endeavored to ascertain the new date when his case was set for trial by examination of the Justice of the Peace dockets or by making inquiry of the Justice or of the lawyer as to the new date, and that the judgment was the result of his negligence. The

It seems, from the defendant's own statement of facts, that the case was continued to March 17, 1959, at which time the issues was heard and judgment entered.

It does not appear from [illegible] in the motion that the defendant ever made an effort to locate [illegible] to find the time to which the case was [illegible], by either examining the docket of the justice of the peace or by [illegible] when his case was set for trial. [illegible] that there was nothing done by him [illegible] and the date when [illegible], or either [illegible] allowed for an appeal, but [illegible] that he did not [illegible] continued or [illegible] petition [illegible] had been [illegible] 18, 1959, [illegible] consider the [illegible] determine [illegible] the case [illegible] to show by the [illegible] assertion [illegible] negligence.

In the [illegible] involved [illegible]

[illegible] be in doubt [illegible] it be [illegible] intervention [illegible]

[illegible] appear to have [illegible] was not [illegible] or by making in duty of [illegible] date, and that the judgment [illegible]

statute covering continuances in the Justice of the Peace courts is set forth in Chapter 79, Section 68, Illinois Revised Stat. 1937, State Bar Assn. Ed., which provides:

> "The justice, before the commencement of the trial, may continue a cause not exceeding ten days at any one time, upon consent of the parties, or for any good cause shown, and either party shall be entitled to such continuance if it shall appear upon his oath, or that of a credible witness, that he can not safely go to trial on account of the absence of material testimony. No continuance shall be granted on the application of either party, unless it shall appear that he has used due diligence to be ready for trial; nor for the want of evidence if the other party will admit the facts proposed to be proved, or if the evidence desired is the testimony of a witness, that the witness, if present, would testify as alleged by the party applying for the continuance; and the party making such admission may controvert the facts proposed to be proved by such absent witness."

When we come to consider this case from the facts alleged in the petition, we are of the opinion th t the defendant did not show the exercise of due diligence in ascertaining when the case was set for trial, and that by his negligence the judgment resulted. From the facts, it does not appear that any advantage was taken of defendant. We believe the court was justified in entering the order quashing the writ of certiorari th t was issued in this cause.

The order entered by the court is affirmed.

AFFIRMED.

DENIS E. SULLIVAN, P.J. AND BURKE, J. CONCUR.

41308

HELEN JENSEN,

Plaintiff - Appellant,

v.

CITY OF CHICAGO, a Municipal Corporation,

Defendant - Appellee.

306 I.A. 265

MR. JUSTICE [illegible] delivered the opinion of the court.

This is an action by plaintiff to recover damages from the city of Chicago for personal injuries sustained on December 27, 1937, when plaintiff fell by reason of a broken and defective sidewalk on the west side of Kilbourne Avenue in the 1300 block in Chicago. The jury returned a verdict in favor of plaintiff and assessed her damages at the sum of $[illegible], and the court entered judgment on the verdict. Motion for a new trial was made by the plaintiff and denied.

On December 27, 1937, at about 11:30 A. M., plaintiff, who was 61 years of age, was alone, walking in a northerly direction in the 1300 block on Kilbourn Avenue on her way to take an Armitage Avenue street car. When she approached a place on the sidewalk about three feet south of the alley, in front of a building which adjoined the sidewalk and extended to that alley, she came to a puddle on the sidewalk, and, to avoid walking into the puddle, she walked around it, stepping into or upon a broken and defective portion of the sidewalk, which defective portion contained or was covered with water. The defective condition of the sidewalk was first seen by a witness named Peter Schnider in September, 1937, when he began to work in the building adjacent to that sidewalk. The condition of the sidewalk on December 27, 1937, the day of the accident, was the same as it was in September, 1937, and the same as shown in plaintiff's photographic exhibit of the place in question.

Plaintiff fell in a puddle of water on her head, shoulder and left side of her body, striking the sidewalk as she described it "with an awful crash", and knew then that something broke. The

Mills Issue.

Plaintiff - Appellee,

v.

CITY OF CHICAGO, a municipal corporation,

Defendant - Appellee.

3061.A.269

Mr. Justice [illegible] delivered the opinion of the court.

This is an action by plaintiff to recover damages from the city of Chicago for personal injuries received on December 27, 1927, when plaintiff fell by reason of a defective and dangerous sidewalk on the west side of Kilbourne avenue in the [illegible] block in Chicago. The jury [illegible] a verdict [illegible] assessed her damages at [illegible] judgment on the verdict. [illegible] by the plaintiff and denied.

On December [illegible], 1927, [illegible] plaintiff, [illegible] who was 61 years of age, [illegible] in the 1900 block on Kilbourne avenue [illegible] Kilbourne avenue street car. [illegible] three feet south of the [illegible] the sidewalk and extending [illegible] the sidewalk, and, [illegible] stepping into or [illegible] which defective condition [illegible] defective condition [illegible] named Peter [illegible] the building adjacent [illegible] on December 7, 1927, [illegible] in September, 1927, and [illegible] exhibit of the [illegible]

Plaintiff [illegible] and left side of her body, [illegible] it "with an extra crash", and [illegible]

tried to get up but slumped right down again, and the next thing she knew she was in an automobile, from which automobile she was carried to her home by Alfred Dorf, and there placed upon a bed and her clothes removed by Mrs. Dorf. During the drive from the scene of the accident, a witness spoke to plaintiff, but received no reply, and believed that plaintiff was not then fully conscious.

Dr. Roberg came to plaintiff's home, and after making an examination and rendering temporary aid, took her in his automobile to the Swedish Covenant Hospital. Immediately following the accident and up to and after she entered the hospital the plaintiff was in "terrible agony of pain" and felt a numbness and dizziness in her head. While on the hospital table, she was in extreme pain and had no recollection of all that Dr. Roberg did for her, until she found herself in bed in the hospital in some contraction, in which position she remained for seventeen days and nights, strapped in bed, and unable to move. X-rays were taken while she remained in the hospital and later on August 4, 1938, other X-rays were made by Dr. Mitlin. During her stay in the hospital she was also treated by Dr. Roberg, Jr., in addition to the treatment and services she received from Dr. Roberg, Jr., the interns and nurses. When she left the hospital on January 29, 1938, her arm was in a sling and so remained for seven or eight weeks, during which time she consulted and was under the care of Dr. Roberg. Before the accident she was in normal good health. Except for the doctor she saw in connection with another accident in which she sustained no serious injuries, she had no occasion to see any other doctor for at least five or six years before the accident in question. In the previous accident she sustained no broken bones, and no injury to her arm, and settled that claim without filing a law suit. Prior to the accident and up to the week before the Christmas holidays, she worked every day canvassing from house to house, selling a certain article. Since the sling was removed, she has no strength in the arm, can't move it normally, can't straighten it out, and

tried to get up, but changed that idea [illegible]. [illegible] knew she was in an automobile, from which automobile she was carried to her home by friend Ford, and there [illegible] and her clothes removed by him, Ford. [illegible] the [illegible] of the accident, a witness came to [illegible], but [illegible] and believed in [illegible] operations.

Dr. Osborg came to [illegible], and after giving an examination and taking the history [illegible], took her in his automobile to the Swedish Covenant Hospital. Immediately following the operation and up to and after she entered the hospital [illegible] in a terrible agony of pain and [illegible] and distress in her head. While on the hospital [illegible], she [illegible] with her no recollection of all in [illegible]. Osborg did for her, until she found herself in bed in the hospital in some [illegible]. In this condition she remained for several [illegible] unable to move. X-rays were taken [illegible] and later on August 4, 1920, other [illegible]. During her stay in the hospital she [illegible] Dr. Osborg, Dr. Jr., the internes and nurses. [illegible] Dr. Osborg, in addition to the treatment and [illegible] Dr. Osborg, 29, 1920, her eye was [illegible] was or eight weeks, during which time she [illegible] of Dr. Osborg. Before the accident [illegible] for the doctor and in [illegible] she suffered no serious injuries. [illegible] other doctor for at least [illegible] in the [illegible] investigation. In the [illegible] no injury to her eye. [illegible] tion to the contract [illegible] she worked every day [illegible] certain article. Since the [illegible] in the eye, can't move it normally, [illegible]

can't raise it all the way up. From the date of the accident up to the time of the trial, she suffered pains in the shoulder and arm, and dizziness and ringing in her head. The ringing was present even at the time she testified, at which time she indicated that she was unable to raise her arm any higher than at a right angle to her body, although she had normal use of the arm before the accident. While in the hospital, her arm was in a setal Thomas splint, and she was strapped to the bed with an iron ring, in such a condition that for the full seventeen days and nights she could not move, get up, stir, wash or do anything.

The X-rays showed that the outside shaft of the humerus overlapped the head or ball of the humerus by three-fourths of an inch, which condition was the result of a comminuted fracture. By reason of this fracture, she has a permanent shortening of that arm by three-fourths of an inch as shown by the X-ray film, which not only showed the fracture described by Dr. Zeitlin, but also showed the Thomas splint which fitted into the arm pit to allow the arm to rest. The shortening was present because one of the bones involved in the fracture slipped past the other instead of remaining end to end. Other X-ray films were introduced in evidence which showed the condition of the arm as the result of the accident. The testimony of Dr. Zeitlin stands uncontradicted by any witness, fact, or circumstance, and his qualifications as an expert were admitted by counsel for the defendant.

It also appears that defendant presented no defense as to its liability and offered no evidence except to call the plaintiff under section 60 of the Civil Practice Act and interrogate her only with reference to a previous accident which was of a trivial nature and in which she sustained no serious injuries. Consequently, the facts are not in dispute.

The plaintiff contends that the verdict and judgment are inadequate and manifestly against the weight of the uncontradicted

[illegible] take it all the way up. [illegible] the [illegible] to the time of the trial, she [illegible] and [illegible] and dizziness and vomiting in [illegible]. [illegible] even at the time she [illegible] she was unable to [illegible] her body, although she does [illegible] consent. While in the hospital, her [illegible] she was stripped to the [illegible] shot for the full [illegible] up, with, each of [illegible].

The [illegible] evaluated the mind or will [illegible] ion, which condition [illegible] reason of this [illegible] by three-fourths of an [illegible] only showed the [illegible] the [illegible] to test. [illegible] in the [illegible] end. Other [illegible] the condition of [illegible] of ur. [illegible] circumstances, [illegible] counsel for [illegible].

It also [illegible] its liability and [illegible] under section [illegible] with reference to [illegible] and in which she [illegible] facts are not [illegible].

[illegible] inconsistent and [illegible]

evidence relating to the physical injuries and damages sustained by plaintiff, and further contends that where the jury are instructed as to the proper elements of damage and apparently ignore the same, by rendering an inadequate verdict, a new trial should be granted. Dr. Moberg's bill for services was $1[illegible].00, her hospital bill was $155.00, and Dr. Keitlin's bill was $35.[illegible], making a total medical expense of approximately $300.00, and the jury only allowed, in addition to plaintiff's actual pecuniary expense, the sum of $50.00 for pain and suffering, inability to get around, and the permanent, serious injury which she sustained, and, therefore, plaintiff contends that the jury apparently misapprehended, or did not consider or apply the instructions of the court with reference to the elements of damage to which plaintiff was entitled, in arriving at their verdict, and that the verdict of $350.00 is inadequate, and does not and cannot fairly compensate plaintiff for her injuries and damages, or give her what the law contemplates should be awarded to her. In support of her position, plaintiff cites Crowder v. Beckman, 275 Ill. App. 193, wherein plaintiff was 22 years of age and sustained a broken arm, the testimony showing pecuniary expense of $332.75, for which amount the jury returned a verdict. In that case, this court said:

> "Lastly, the contention is made that the verdict is grossly inadequate. * * * The obligations actually incurred were the bills of Dr. McKelvey, $100; Dr. Shumaker, $143.25; St. Elizabeth's Hospital, $79.50; Burke Funeral Home, $10, or a total of $332.75, the amount of the verdict. It is thus obvious that the jury deliberately allowed appellant for the actual incurred expense attendant upon the injury, and nothing for pain or suffering or for the deformity of the arm, for its permanent partial loss of use, or for her inability to work since the accident. The jury were instructed that these were proper elements of damage, and to be considered by them as such, yet manifestly they ignored the instruction and refused to be bound by it.
>
> "Under the evidence appellant was either entitled to recover, or she was not. If there was liability in her favor she merited an award based upon the elements of damage which the undisputed testimony showed she had sustained, and which it is demonstrated with mathematical certainty she was, in part, denied.
>
> " * * * Having decided that she was entitled to an award, the jury were bound, in making same, to take into consideration all of the elements of damage which were proven. This they did not do, for which reason the amount of the verdict, upon the record, was inadequate. Where such is true, and it is obvious that a jury have failed to take into consideration proper elements of damage which have been clearly proven, a new trial should be awarded. Paul v. Leyenberger, 17 Ill. App. 167; Kilmer v. Parrish, 144 Ill. App. 270."

Plaintiff also cites, Kilmer v. Terrish, 144 Ill. [illegible] 70; and Styburski v. Riverview Park Co., 198 Ill. App. 1; and Riley v. City of Chicago, 202 Ill. App. [illegible].

From the facts it appears that the jury allowed the plaintiff $300.00, which she had been obliged to expend for hospital, doctor and medical expenses, and in addition $[illegible].00 to compensate for pain and suffering, her inability to get around and for her permanent injury, resulting from the shortening of her arm. Plaintiff was in the hospital, strapped to a bed, for seventeen days and nights, and carried her arm in a sling for 7 or 8 weeks. She was, therefore, thus incapacitated for a total of about 60 days, and the $[illegible].00 awarded to her, if pro-rated per day, amounts to less than $1.00 per day. According to Dr. Wigglesworth's Table of Mortality, Scribner on Dower, page 815, the jury's award, over and above actual pecuniary damages, amounted to $[illegible].80 per year for plaintiff's permanent and serious injury, she having a life expectancy of 14.86 years. Such an award of approximately $[illegible].00 for the permanent injuries and damages sustained, and the permanent shortening in the arm, the absorption of bone because of the lack of calcium content, the pain and suffering endured while lying strapped in bed in the hospital for 17 days with traction apparatus pulling on her arm, and for pain and suffering endured during the 7 or 8 week period during which she carried her arm in a sling and since that time, does not seem to be fair and reasonable compensation.

There is another question here that might have had some influence on the jury and that is as to the examination of plaintiff, called as an adverse witness, regarding a previous accident. It appears that there was a Dr. Kushner, who treated her for the injuries sustained in that previous accident and that the Doctor had prepared a statement which was marked for identification before the jury, and during the course of the trial plaintiff was interrogated with reference to these matters, the purpose of which does not clearly

[illegible] also cited, Kilmer v. [illegible], [illegible] and Hayburnes v. Waterman [illegible], [illegible] v. [illegible] of Spokane, 30 [illegible].

Also the Court is [illegible] $300.00, which has had been [illegible] and medical expenses, [illegible] and suffering, [illegible] injury, resulting from [illegible] the hospital, [illegible] carried her from [illegible] than two months and for a total of [illegible] amounted to her, if pre-[illegible] per day. According to [illegible] neither on Lower [illegible], the jury's pecuniary [illegible] permanent and [illegible] years. [illegible] injuries [illegible] are, the [illegible] the pain and suffering [illegible] hospital for [illegible] for pain and suffering [illegible] which she carried her [illegible] seem to be fair and [illegible]

[illegible] influence on the jury [illegible] called on to [illegible] associate that [illegible] sustained in that [illegible] a statement which was [illegible] during the course of the trial [illegible] reference to these matters, the [illegible]

appear from the briefs. However, the statement that was marked for identification was not introduced in evidence nor was Dr. Kushner called to testify. Upon her interrogation regarding Dr. Kushner, plaintiff stated, "I did not tell him at the time that I had constant headaches and felt dizzy right along because of the accident. I told him that I was generally sick and upset from it. * * * I absolutely did not complain to Dr. Kushner on or about November 18, 1937, that I had severe headaches and dizziness and blurring with spots in front of my eyes." Even if the matter of the previous accident had been material, it would seem to have been proper to call Dr. Kushner, and thus avoid inferences, which were not warranted. If the statement had been introduced in evidence for the purpose of impeaching the plaintiff, it might have been proper, but such does not seem to have been the purpose in this case. When we come to consider that for 17 days the plaintiff was in the hospital, her limitation of motion of her arm and its permanent injury, and her pain and suffering, we are of the opinion that approximately $50.00 was not a fair compensation, and it may be that by reason of the statement of Dr. Kushner and the interrogation of plaintiff concerning same, made before the jury, had some influence in the amount of damages awarded.

Considering the fact that the defendant offered no defense as to the accident and as to the happening of same, nor as to plaintiff's injuries, we are of the opinion that the jury did not render a fair and adequate verdict to recompense the plaintiff; and that the court should have granted a new trial to enable the plaintiff to again present her case to obtain an adequate recovery.

For the reasons stated, a new trial should have been allowed and the judgment is, therefore, reversed and the cause remanded.

REVERSED AND REMANDED.

DENIS E. SULLIVAN, P.J. AND BURKE, J. CONCUR.

41219

FRANK NAGO,

Plaintiff - Appellee,

v.

THOMAS NAGLE,

Defendant - Appellant.

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APPEAL FROM
[illegible]
[illegible]
[illegible] COUNTY.

46 A

306 I.A. 266

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment for $500 entered by the court upon finding the defendant guilty and assessing plaintiff's damages for property damage and personal injuries in the sum of $[illegible].00, alleged to have been sustained by the plaintiff on June 3, 1939, in an automobile accident occurring on 21st Avenue between Lake and Main streets in Melrose Park, Illinois, when there was a collision between the plaintiff's automobile and the truck of the defendant, being then and there operated by one Jake Barthelme, an employee of defendant. No point is raised on the pleadings, but the principal point on which the defendant relies is his defense as set forth in his amended answer which contended that the damage and injury, if any, sustained by the plaintiff resulted from the fact that the operator of the defendant's truck was placed in a position of sudden emergency without any fault on the part of such operator and that such operator made such choice as a person of ordinary prudence placed in a similar position might have made. A counterclaim was filed by defendant but was not pressed at the trial.

The facts as they appear are that defendant lived on a farm near Melrose Park, Illinois, and owned a 1938 Ford truck which he used in his farming and trucking business. On the day of the accident, this truck was being operated by one Jake Barthelme who was employed at the time by defendant to assist in his farming and trucking business. This employment terminated about one month later. On June 3, 1939, at about 1:00 o'clock or shortly thereafter, Barthelme was driving the defendant's truck north on 21st Avenue,

headed toward Lake Street. He was alone at the time. The plaintiff, Frank Rago, lives in Melrose Park and was employed by the WPA, and on occasions by one David Carlino, also of Melrose Park. The plaintiff owned and was operating at the time of the accident, a 1934 Buick sedan, which he was driving south on 21st Avenue accompanied by David Carlino. When Barthelme, driving the defendant's truck at a speed of approximately 20-25 miles per hour, arrived at about the middle of the block, it is claimed by the defendant, a child suddenly ran into the street from in front of parked cars on the right or east side of the Street. In order to avoid striking the child, Barthelme swerved the defendant's truck sharply to the left and could not avoid colliding with the automobile of plaintiff coming toward Barthelme from the north.

These facts, however, as to a child suddenly appearing in the Street and as to Barthelme swerving the defendant's truck sharply to avoid striking the child and as a result colliding with plaintiff's automobile are in controversy.

It is suggested by the defendant that plaintiff, having seen the child, had brought his automobile almost to a stop near the curb on the west side of the street. Twenty First Avenue is 27 feet wide. The left front of the defendant's truck collided with the left front of the plaintiff's automobile. The cars came to a standstill almost immediately with the defendant's truck in the center of the street headed north and alongside the cars parked on the east side of the street The plaintiff's Buick came to a stop headed south with its right wheels close to the west curb of 21st Avenue. The left front tires of both vehicles blew out and both frames and axles were bent.

The plaintiff contended that no child ran into the street but that Barthelme, not watching where he was going, inattentively drove the defendant's truck into the plaintiff's automobile. Plaintiff claimed to have suffered property damage in the sum of $171.85 and to have had a doctor bill of $25.00 and an x-ray bill of $10.00.

It is further suggested by the plaintiff that he received personal injuries at the time of the accident, and a Doctor testified

headed toward [illegible] street. [illegible] of his time. The plaintiff, Frank Lago, lives in [illegible] employer of the city, and on occasions by [illegible] during [illegible]. The plaintiff owned and was operating [illegible] sedan. [illegible] sedan, which he was driving [illegible] Darling. [illegible] Darling, [illegible] a speed of approximately [illegible] miles per hour, [illegible] the middle of the block, it is claimed by the [illegible] Darling ran into the street from [illegible] side or the other side of the street. In order to [illegible] the defendant's [illegible] with the automobile [illegible] coming from the north.

There [illegible], however, [illegible] only [illegible] in the street [illegible] to avoid striking the [illegible] automobile [illegible].

It is [illegible] the [illegible] the curb, [illegible] on the north [illegible] the left front [illegible] the plaintiff [illegible] immediately [illegible] heading north [illegible] the plaintiff [illegible] close to [illegible] vehicles [illegible].

[illegible] but that [illegible], [illegible] the defendant [illegible] claimed to have [illegible] have had a doctor [illegible].

It is further suggested by [illegible] personal injuries at the time [illegible]

to having treated the plaintiff 10 or 11 times. The defendant, however, denied that plaintiff was injured and offered evidence in support of his denial.

The evidence was conflicting and the defendant sought to impeach the plaintiff by certain signed statements admitted in evidence. The court sitting without a jury, after giving consideration to the testimony of the witnesses, found the defendant guilty as charged and assessed plaintiff's damages as has been already suggested in this opinion.

There was offered in evidence by the defendant, defendant's exhibit 1, which is a statement signed by the plaintiff, and as a portion of this statement it appears;

> " " " I was driving south on 21st Ave. There were two cars parked on the right and two on the left side of the street - - I saw a truck approaching from the south, and just as it got between the parked cars a small child ran out in front of the truck. In order to avoid a collision I turned to the right almost directly behind the parked cars on my right and had almost stopped, when the truck, in avoiding striking the child ran into the left side of my car. " " "

This statement was taken by the witness Willis, an adjuster for the Illinois Agricultural Mutual Insurance Company, on the day following the accident, and was signed by the plaintiff in two places. There was a further exhibit offered by the defendant in which plaintiff makes this statement:

> " " " I saw a north bound truck and as it got between the parked cars a small child started to run from the east just ahead of the parked cars. I could see the child but the truck driver could not. The child ran into the street. I pulled my car to the right and almost stopped. When the truck driver saw the child he turned to his left to avoid striking the child and struck the left front fender, wheel, axle and spare wheel with the left front wheel, fender and bumper of the truck."

This statement was taken and prepared by a witness named Kinney, a staff adjuster for the Illinois Agricultural Mutual Insurance Company, five days after the accident, and was signed by the plaintiff in two places.

From the testimony of officer Jedke, who appeared at the scene of the accident just after it occurred, it appears that in

ascertaining the facts he inquired of Barthelme, the driver of defendant's truck, how the accident happened, and Barthelme said that he was driving north on 21st Avenue, and he noticed a child running across the street, and to avoid hitting the child, he struck an automobile. The officer asked plaintiff if Barthelme's statement was satisfactory and if that was how it happened, and plaintiff said "well, we will let it go at that".

It further appears from the evidence of the witness Barthelme, defendant's driver, that when he reached about the middle of the block he saw a little child and "I swung my truck, and before I knew it, Rago was coming and I plowed right into him. Traveling about twenty or twenty-five, going north. Child appeared from right side. There were two cars parked along the side, there where the child was at. The child first appeared about ten feet in front of the truck. I just passed one parked car, the rear car. There was two parked cars. The child came out from the front car. * * *"

The plaintiff, in explaining the two statements signed by him, as hereinbefore suggested, said that he had been asked to sign such statements in order to protect defendant's driver from losing h job. The trial judge said that he did not believe the defendant's driver's story about the child and that plaintiff made the signed statements for the purpose of protecting defendant's driver's job.

So, the question is as to whether the court was justifie from the evidence in finding the defendant guilty and assessing damages for the amount that was entered in the judgment. The cour after consideration of the facts, and after having had before him witnesses who testified, and having no doubt considered all the questions brought to his attention, found for the plaintiff. The however, is that plaintiff signed these two statements. By his testimony, he signed them for the purpose of misleading the defe to the extent that his driver was not to blame for this accident is not a very creditable thing for the plaintiff to do. Then/a

ascertaining the facts [illegible] the driver of defendant's truck, now the [illegible] defendant was not the driving motor [illegible] across the street, and [illegible] mobile. The officer [illegible] satisfactory and [illegible] we will let it go at [illegible].

It further [illegible] defendant's driver, [illegible] blood he saw a little child [illegible] ago was coming [illegible] or twenty-five. [illegible] there were two cars [illegible] the child first [illegible] passed one [illegible] child [illegible].

The [illegible] him, he [illegible] such statements [illegible] job. The [illegible] driver's story [illegible] statement [illegible] from the [illegible] damages [illegible] other [illegible] witnesses [illegible] questions [illegible] however, [illegible] testimony, [illegible] to the extent [illegible] is not a very [illegible]

plaintiff suggested that there was a further reason for his signing those statements, namely, that his damages would be paid by the defendant. We have examined the record carefully and we did not find any evidence which would warrant such a suggestion.

It is true that, if there was a child who suddenly appeared in the street, and defendant's driver acted in an emergency to avoid striking the child and in so doing did what an ordinarily prudent person would have done under the circumstances, of course, there would be no liability.

While the evidence in certain respects is in conflict, and this court is reluctant to set aside the finding and judgment of the trial court, we believe that the evidence as it appears from the record sufficiently supports defendant's theory of the case to warrant a new trial.

For the reasons herein stated, the judgment of the trial court is reversed and the cause remanded for a new trial.

[illegible].

JENIS E. SULLIVAN, P.J. [illegible], J. [illegible].

plaintiff suggested that there [illegible] the statements those statements, nearly, that the [illegible] is the defendant. We have examined the record [illegible] is not that any evidence which [illegible].

It is true that, if it is as [illegible] in the street, [illegible] striking the child [illegible] person would have done under the circumstances, [illegible] there would be no liability.

While the evidence [illegible], and this court is reluctant [illegible] the trial court, we believe [illegible] the record satisfactorily [illegible] a new trial.

[illegible] court is reversed [illegible].

41003

ANDERSON AND LIND MANUFACTURING COMPANY, an Illinois Corporation,
Intervening Petitioner - Appellant,

v.

CHARLES R. ALBERS, RECEIVER of the LARAMIE STATE BANK OF CHICAGO,
Respondent to Intervening Petitioner and Appellee.

) APPEAL FROM
) SUPERIOR COURT,
) COOK COUNTY.

306 I.A. 267

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The Laramie State Bank of Chicago on August 16, 1930, at 6:00 P.M., was closed by the Auditor of Public Accounts, and a receiver appointed, whose appointment was later confirmed by the court. On March 17, 1931, the intervening petitioner, Anderson and Lind Manufacturing Company, filed a claim with the receiver for $25,230.45, which was the amount of its deposit credit in the bank on the day that it closed. September 7, 1932, it filed its original intervening petition in which it averred that on the day the bank closed it purchased from the bank certain securities described in the petition for $20,000, for which it gave its check, and that the securities were never delivered to it. Further, that on the same day it advanced to the bank $2,000 upon the promise that the loan would be secured by ample securities, which promise was never kept. The petition prayed the securities be turned over to petitioner as agreed or, in the alternative, a preferred claim allowed for these amounts.

Later, March 7, 1933, the intervenor filed a supplemental petition in which it represented that December 13, 1929, B. V. Anderson, then its secretary and treasurer, who was also at that time a director of the Laramie State Bank, drew two checks of petitioner on the Noel State Bank of Chicago, one for $19,000 and the other for $30,000, payable to the order of the Laramie State bank; caused the checks to be certified by the Noel State Bank and delivered to the same to the Laramie State Bank, which cashed the checks and

AMBRIDGE AND LAKE [illegible]
COMPANY, an Illinois corporation,
Intervening petitioner - appellant,

v.

CHARLES H. ADAMS, MODERATOR of the
LARAMIE STATE BANK [illegible],
Respondent to Intervening petitioner
and [illegible] appellee.

MR. PRESIDING JUSTICE MCCULLOUGH [illegible]

The Laramie State Bank of [illegible], 1[illegible], on 8:00 P.M., was closed by the action of [illegible] receiver appointed, where [illegible] by the court. On March 7, 1931, the [illegible] Lind Manufacturing Company, filed [illegible] 38,[illegible].42, which was the amount [illegible] on the day that it closed. [illegible] intervening petition in which it [illegible] closed it [illegible] the petition for [illegible] months [illegible] day it [illegible] would be [illegible] The petition prayed [illegible] agreed or, in the [illegible] amounts.

[illegible], 1[illegible], the intervening [illegible] petition in which it [illegible] March [illegible] time a director of the [illegible] tillmer on the [illegible] other for $[illegible],000, payable to the [illegible] owned the notes to be entitled [illegible] to the same to the Laramie State [illegible]

converted the proceeds to its own use; that at that time petitioner was not indebted to the Laramie State Bank, and that petitioner received no consideration for these sums of money; that the transfer of funds of petitioner from the Noel State Bank to the Laramie State Bank was without legal right or authority of Anderson and Lind Manufacturing Company, of which the bank had full knowledge. Wherefore, the intervenor prayed its claim for this $49,000 with interest be allowed as a preferred claim against the assets of the bank.

The receiver answered denying the material averments of the original and supplemental petitions. The cause was referred to a master who reported. The court thereupon made a second reference for the purpose of ascertaining the amount of cash on hand in the Laramie State Bank the date it was closed. He reported that at 1:00 P.M. on that date it was between $5,000 and $7,000 and at 6:01 P.M., $1,571.91. The cause was heard on exceptions of the petitioner to these reports, and June 29, 1933, a decree was entered as recommended by the master, which disallowed the $49,000 claim and denied preference to the other two claims, but allowed petitioner $25,230.45 as a general claim. From that decree the intervening petitioner has appealed.

With reference to the $2,000 item, the evidence shows that on the day on which the bank closed, B. G. Anderson, then the president of the Laramie Bank and also secretary and treasurer of the intervening corporation, drew a check against the funds of petitioner on deposit with the Noel State Bank of Chicago for $2,000. The check was made payable to the order of the Columbia State Bank. B. G. Anderson then took the check to the Columbia State Bank and cashed it, returned with the cash to the Laramie State Bank and handed it to Mr. Anda, a receiving teller. Anda made out a deposit slip to petitioner which was on the same day mailed to it. Petitioner's account was credited on the books of the Laramie Bank with $2,000 as of August 16. The petitioner claims (and testimony given by B.G. and A. G. Anderson tended to show) that this transaction was in fact a loan by petitioner to the Laramie Bank with the promise that the bank

converted the proceeds to its own use; that at that time petitioner was not indebted to the Lamesia State Bank, and that petitioner received no consideration for these sums of money; that the transfer of funds of petitioner from the Xoel State Bank to the Lamesia State Bank was without legal right or authority of Anderson and Lind Manufacturing Company, of which the bank had full knowledge. Therefore, the intervenor prayed its claim for this sum with interest allowed as a preferred claim against the assets of the bank.

The receiver answered denying the material averments of the original and supplemental petitions. The cause was referred to a master who reported. The court thereupon made a second reference for the purpose of ascertaining the amount of cash on hand in the Lamesia State Bank the day it was closed. He reported that at 1:00 p.m. on that date it was between $8,000 and $7,000 and at 3:01 p.m., $1,271.21. The cause was then on exceptions of the petitioner to these reports, and June 21, 1[illegible], a decree was rendered as recommended by the master, which disallowed the $[illegible] to petitioner, interference to the other ten claims, but allowed petitioner $[illegible] as a general claim. From that decree the intervenor petitioner was appealed.

With reference to the $[illegible] item, the evidence shows that on the day on which the bank closed, [illegible], the president of the Lamesia Bank and also secretary and treasurer of the Lamesia Manufacturing Company, drew a check against the [illegible] in the amount with the [illegible] made payable to the order of the plaintiff [illegible] then took the check to the Lamesia State [illegible] turned with the cash to the Lamesia State [illegible] made, a receiving teller. [illegible] petitioner which was on the same day mailed to it. [illegible] credited on the books of the [illegible] 10. The petitioner claims (in [illegible] B., and [illegible] Anderson tended to show this [illegible] by petitioner to the Lamesia [illegible]

would put up security for the amount of it. The master's finding is that the books indicate a deposit but that it was immaterial whether the transaction was a deposit or a loan, since in either case the relationship of debtor and creditor was established. If we assume the transaction to have been a loan, the claim for preference is based merely on the promise of the bank to give security, which it failed to do. This would not create a preference. On the other hand, if it was a mere deposit an agreement of the bank to pledge its assets as security would be unlawful. People v. Wiersema State Bank, 361 Ill. 75. The master found the transaction was a deposit. His finding has been approved by the chancellor, and we can not say that the finding is manifestly against the evidence. The court did not err in denying the preference as to this claim while including the item in the general claim allowed.

As to the $20,000 item, the evidence tends to show that August 16 (the day the bank closed) was Saturday, and that on that day petitioner closed its office at 1:00 o'clock. On that day petitioner had on deposit in the Laramie bank $23,230.45. About 1:00 P.M. the bank had on hand in actual cash between $5,000 and $7,000, and when the bank was actually closed by the Auditor of Public Accounts at the request of its board of directors at 6:01 P.M., the actual amount of cash on hand was $1,571.91. Before going to the bank L. G. Anderson, president of intervenor, directed his nephew, H. M. Anderson, who was vice president and assistant secretary of petitioner, to sign two checks drawn on the Laramie Bank. H. M. Anderson did so, drawing the checks without designating in either of them a payee or writing in either of them the amount of the check. L. G. Anderson then had his bookkeeper, G. J. Schmid, fill in one of these checks for the sum of $20,000 and make the same payable to the Laramie State Bank. Schmid, the bookkeeper, then went with L. G. Anderson to the Laramie Bank, and L. G. Anderson delivered this check to Mr. Redmond, cashier, telling him he wished to buy secur-

would put up security for the amount of it. The master's finding is that the books indicate a deposit but that it was immaterial whether the transaction was a deposit or a loan, since in either case the relationship of debtor and creditor was established. If to assume the transaction to have been a loan, the claim for preference is based merely on the promise of the bank to give security, which it failed to do. This would not create a preference. On the other hand, if it was a mere deposit an agreement of the bank to pledge its assets as security would be unlawful. People v. Sierras State Bank, 301 Ill. 75. The master found the transaction was a deposit. His finding has been approved by the chancellor, and we can not say that the finding is manifestly against the evidence. The court did not err in deciding the preference as to this claim while including the item in the general claim allowed.

As to the $17,000 item, the evidence tends to show that August 19 (the day the bank closed) was Saturday, and that on that day petitioner closed his office at 4:00 o'clock. On that day petitioner had on deposit in the Lincoln bank $21,[illegible].40. About 1:00 P.M. the bank had on hand in actual cash between $3,[illegible] and $7,000, and when the bank was actually closed by the director of public accounts at the request of its board of directors at 6:30 P.M., the actual amount of cash on hand was $1,821.91. Before going to the bank L. G. Anderson, president of Interveneer, directed his nephew, H. K. Anderson, who was vice president and assistant secretary of petitioner, to sign two checks drawn on the Lincoln bank. . . . Anderson did so, drawing the checks without dating-line in either of them a payee or writing in either of them the amount in figures. L. G. Anderson then had his bookkeeper, G. G. Grant, fill in one of these checks for the sum of $17,000 and make the same payable to the Lincoln State Bank. Grant, the bookkeeper, then went with L. G. Anderson to the Lincoln bank, and L. G. Anderson delivered this check to Y. Redmond, cashier, telling him he wanted to buy cash-

ities from the bank. Redmond selected the securities and wrote the number of each item on the check. Redmond knew that a representative of the Auditor of Public Accounts would be at the bank at 4:00 P.M., and after selecting the loans and securities declined to deliver the same to Anderson without the approval of the representative of the auditor. Mr. Edgerton, chief bank examiner for the Cook county district, came to the bank about 3:00 P.M. and Mr. Redmond asked him if it would be all right to go through with the transaction. Edgerton said the bank was still open and Redmond had a right to do this, but that in his opinion "it wasn't right to allow the people who knew the condition of the bank to be preferred creditors," and further that if he were Redmond he would refuse to deliver the securities. L. G. Anderson returned to the bank about 4:00 P.M. and Redmond informed him of the examiner's views. L. G. Anderson then suggested that the time of the delivery of the check and the numbers of the bank loans be written on the check, and thereupon Schmid wrote upon the face of the check "1:00 P.M." and on the reverse side of the check the office numbers of the loans which were selected by Redmond. Redmond kept the check but held the notes which were afterward taken over by the receiver and became a part of the estate. The check was not charged to the account of the intervening petitioner.

The decree finds that the president of petitioner, its secretary and treasurer, were stockholders of the bank, and that the secretary and treasurer of the petitioner was president of the bank; that petitioner taking advantage of special knowledge and confidential information of its officers, sought an advantage over other depositors by securing payment of its claim on demand by endeavoring to obtain these securities of the bank; further, that if the transaction had been consummated it would have been void as a fraud upon the creditors of the bank, and that equity ought not to lend its aid for the delivery of the securities.

It is significant, we think, that the petition to recover these securities was not filed until September 7, 1932, and that the

lice from the bank. Hedgecock selected the securities and wrote the number of each item on the sheet. Hedgecock knew that a representative of the auditor of public accounts would be at the bank at 4:00 P.M., and after selecting the loans and securities desired to deliver the same to Anderson without the approval of the representative of the auditor. Mr. Edgerton, chief bank examiner for the Cook county district, came to the bank about 3:00 . , and Mr. Hedgecock asked him if it would be all right to go through with the transaction. Edgerton said the bank was still open and Hedgecock had a right to do this, but that in his opinion it wasn't right to allow the people who knew the condition of the bank to be preferred creditors," and further that if he were Hedgecock he would refuse to deliver the securities. . . . Anderson returned to the bank about 4:00 P.M. and Hedgecock informed him of the examiner's views. Mr. Anderson then suggested that the time of the delivery, of the check and the numbers of the bank loans be written on the check, and thereupon Hedgecock wrote upon the face of the check "1:30 P. M." and on the reverse side of the check the office numbers of the loans which were selected by Hedgecock. Hedgecock kept the check but did not note which were otherwise taken over by the receiver and became a part of the assets. The checks are not charged to the account of the intervening petitioner.

The course finds that the treasurer of petitioner, the secretary and treasurer, were stockholders of the bank, and that the secretary and treasurer of the petitioner was president of the bank; that petitioner taking advantage of special knowledge and confidential information of its officers, sought to withdraw two other depositors by securing payment of its claim on fraud by a conspiring to obtain these securities of the bank; further, that if the transaction had been consummated it would have been void as a fraud upon the creditors of the bank, and that equity would not lend its aid for the delivery of the securities.

It is significant, we think, that the petition to recover

delay is not excused. It is also significant that March 17, 1931, petitioner had filed its claim with the receiver for $25,230.45, being the total amount of the deposit credited to it on the books of the bank on the day it closed. It is apparent, we think, that as to both items the idea of a preference was an afterthought. The delivery of the check for $20,000 on a bank which did not have enough cash on hand to meet it can not be considered as payment for the securities, and equity could not under these circumstances lend its aid in carrying out what was an unconscionable transaction. The court did not err in refusing to give these two claims a preference or in refusing to grant specific performance of the alleged contracts and properly included them in the sum of $25,230.45, which was allowed as a general claim.

The claim for $49,000, preferred or otherwise, was first made in petitioner's supplemental petition filed March 7, 1938. It is based on a transaction which occurred several years earlier of which January 2, 1929, may be conveniently taken as a starting point. On that date, the Anderson and Lind Mfg. Co., held a meeting of its board of directors at which L. G. Anderson was elected president and chairman of the board of directors, H. M. Anderson, vice president, and B. G. Anderson, secretary and treasurer. On that date the charter authorized 240 shares of common stock of which the Andersons held 219 shares. B. G. Anderson was also a member of the board of directors of the Laramie State Bank. Carl Mueller was president of the bank and he had caused moneys to the amount of $157,085.52 to be withdrawn from the bank substituting notes in lieu of it. The Auditor of Public Accounts disapproved and demanded the cash be replaced forthwith, failing which the bank would be closed. For two days the board of directors of the bank gave attention to this matter, and finally the members of the board reached an agreement that each one of them would subscribe a certain sum in cash to be used in taking up these notes. B. G. Anderson subscribed for $49,000. On December 13, 1929, B. G. Anderson drew in the name of the corporation two checks for $30,000 and $19,000, respectively,

delay is not excused. It is also significant that March 17, 1931, petitioner has filed its claim with the receiver for $8,850.48, being the total amount of the deposit credited to it on the books of the bank on the day it closed. It is apparent, we think, that as to both items the idea of a preference was an afterthought. The delivery of the check for $30,000 on a bank which did not have enough cash on hand to meet it can not be considered as payment for the securities, and equity could not under these circumstances lend its aid in carrying out what was an unconscionable transaction. The court did not err in refusing to give these two claims a preference or in refusing to grant specific performance of the alleged contracts and properly included them in the sum of $8,250.48, which was allowed as a general claim.

The claim for $45,000, preferred or alternative, was first made in petitioner's supplemental petition filed March 7, 1934. It is based on a transaction which occurred several years earlier of which January 2, 1934, may be conveniently taken as a starting point. On that date, the Anderson and Lind Bldg. Co., held a meeting of its board of directors at which L. G. Anderson was elected president and chairman of the board of directors, J. B. Anderson, vice president, and E. G. Anderson, secretary and treasurer. In that date the charter authorized six trustees of common stock of [illegible] Anderson held five shares, J. B. Anderson was also a member of the board of directors of the Lincoln State Bank. Just [illegible] of the bank and he had caused money to be loaned to [illegible] to be withdrawn from the bank substituting notes in lieu of [illegible]. The Auditor of Public Accounts disapproved and demanded that [illegible] placed forthwith, failing which the bank would be closed. [illegible] days the board of directors of the bank were attending to [illegible] matter, and finally the members of the board reached an agreement that each one of them would subscribe a certain sum in cash to be used in taking up these notes. E. G. Anderson subscribed for $45,000. On December 15, 1932, E. G. Anderson [illegible] in the sum of

upon the account of the corporation in the Noel State Bank. Each check was payable to the Laramie State Bank of Chicago. B. G. Anderson and his brother, L. G. Anderson, went to the Noel Bank where they saw its president, Mr. Hausmann. B. G. Anderson said he had come to arrange a loan sufficient to pay his subscription. He then executed a note in the name of the corporation and delivered it to the Noel State Bank. The note was for $50,000, payable in 60 days, and as security B. G. Anderson deposited securities of the face value of $114,000. The $50,000 note was at once discounted at the rate of 6 per cent per annum, and the account of the corporation credited with the proceeds, $49,500. B. G. Anderson then had the checks certified for acceptance and payment by the cashier of the Noel State Bank, and the account of the corporation was at once charged with the sum. December 20, 1929, B. G. Anderson delivered these two checks to the cashier of the Laramie State Bank in full payment of his personal obligation of December 8. The checks were paid through the Chicago Clearing House to the Laramie State Bank on December 31; were presented to the Noel State Bank and paid by it.

December 13, 1929, the Anderson and Lind Mfg. Co. was indebted to the Noel State Bank in the sum of $70,000, evidenced by an unsecured promissory note. On December 31, the note of the corporation for $50,000 and the note for $70,000 were paid and returned to Anderson and Lind Mfg. Co. This payment was made $6,000 in cash and by a credit to the Noel Bank of $114,000 representing the discount of an individual note of B. G. Anderson for $114,000, which was delivered by him to the Noel State Bank on that date. The note by its terms was payable January 2, 1930. This individual note on January 2, 1930, was marked paid and surrendered to the Anderson and Lind Mfg. Co. by substituting for it two notes executed by the corporation and delivered by B. G. Anderson to the Noel State Bank, one for $50,000 secured by the same $114,000 collateral and one unsecured note for $70,000. These notes were thereafter paid by the Anderson and Lind Mfg. Co. and the $6,000 cash payment of December 31 was canceled by a credit charge of that amount. The Anderson and Lind

Mfg. Co. was given credit in the Noel Bank in the sum of $746.67 as of December 31, for rebate and interest on the discounted notes, because of the payment of the same before maturity. The books of the Anderson and Lind Mfg. Co. show that B. G. Anderson's personal account was charged with $49,000 on December 31, 1929, on account of the two checks, and a credit was made of the same amount as of that date. This indicated that B. G. Anderson became indebted to the corporation on that date in the sum of $49,000. B. G. Anderson was charged on the books with interest on this sum from December 13, to December 31, 1931, and interest has since been charged continually upon it.

December 13, 1929, the corporation had on deposit with the Noel State Bank, $12,019.48; with the Union Bank of Chicago, $9,777.58; with the Laramie State Bank, $5,671.50. B. G. Anderson was during this time duly authorized by the corporation to borrow, to execute notes and to hypothecate the property of the corporation as security. February, 1930, B. G. Anderson was elected president of the board of directors of the Laramie State Bank of Chicago and served continuously until the bank was closed. The master found that the Anderson and Lind Mfg. Co. loaned to B. G. Anderson $49,000 with the knowledge of L. G. Anderson and with the knowledge of all its officers and stockholders and the board of directors. There is no evidence that he is unable to repay with interest. He is still liable to the corporation, which has made no effort to collect. With full knowledge the corporation has not disapproved of the transaction and is now estopped by its laches.

The master's conclusion was that the Anderson and Lind Mfg. Co. was not entitled to look to the assets of the Laramie State Bank either as a preferred or general creditor. The finding is abundantly sustained by the evidence. Petitioner contends that when a reviewing court concludes that a master's finding as approved by the chancellor is manifestly against the weight of the evidence, the decree should be reversed and cites authorities. This is elementary. We are not able to find that the decree in this respect is manifestly against the

Mr. Co. was given credit in the local bank in the sum of $7[illegible],67 as of December 31, for rebate and interest on the discounted notes, because of the payment of the same before maturity. The books of the Anderson and Link Co. show that J. . Anderson's personal account was charged with $[illegible],000 on December 31, 1[illegible], on account of the two checks, and a credit was made of the same account as of that date. This indicated that J. . Anderson became indebted to the corporation on that date in the sum of $[illegible],[illegible]. R. G. Anderson was charged on the books with interest on this sum from December 12, to December 31, 1[illegible], and interest has since been charged continually upon it.

December 1[illegible], 1[illegible], the corporation had on deposit with the local state bank, [illegible] with the union bank of Chicago, $2,777.[illegible] with the [illegible] bank, $[illegible],671.[illegible]. J. G. Anderson was during this time only authorized by the corporation to borrow, to execute notes and to sign checks in the absence of the president as security. February, 1[illegible], J. . Anderson was elected president of the board of directors of the [illegible] bank [illegible] unanimously until the bank was closed. The matter [illegible] that the Anderson and Link Co., [illegible] J. . Anderson [illegible] knowledge [illegible] the condition of all its affairs and transactions and the [illegible] of claims. There is no evidence that [illegible] with criminal intent. [illegible] liable to the common [illegible] or officer to creditors. The full knowledge the [illegible] of the [illegible] of the [illegible] notice and is no [illegible] by its [illegible].

The [illegible] conclusion [illegible] Anderson and Link Co. was not entitled to look to the use of the [illegible] either as a [illegible] or [illegible]. The liability is absolutely sustained by the evidence. Petitioner contends that when a [illegible] court concludes that a material fact [illegible] by the objection is manifestly against the weight of the evidence, a decree should be reversed and other authorities. [illegible] are not

weight of the evidence, but on the contrary agree that it is amply supported by it. The petitioner argues, citing Ill. Uniform Sales Act, Smith-Hurd Anno. Stats., chap. 121-1/2, §1(2), §19(1), §66, and Commonwealth Trust Co. v. Gregson, 303 Ill. 458, that when securities are segregated and an agreed price paid the sale is consummated. This also may be conceded, but a check on a bank which, as here, does not have cash wherewith to pay the check is not payment. People v. Bates, 351 Ill. 439; Zollman on Banks and Banking, Vol. 10, §6661, are cited to the point that a customer of a bank whose securities have been converted can have a preferred claim so long as the securities can be traced. There is, however, no evidence in the record tending to bring this case within that rule. Many other authorities are cited to the sixteen points argued by the intervenor in his brief. Points of law cannot avail. The plain facts of this case preclude recovery of more than is allowed by the decree. This decree will be affirmed.

DECREE AFFIRMED.

O'Connor and McSurely, JJ., concur.

weight of the evidence, but on the contrary [illegible] is amply supported by it. The petitioner argues, citing [illegible] Act, with-hand [illegible], [illegible], [illegible], 296, and Commonwealth [illegible] v. [illegible], [illegible], [illegible] are segregated and an agreed price [illegible]. This also may be conceded, but a [illegible] have been wherewith to pay the [illegible]. [illegible] v. [illegible] 351 III. 436; [illegible] on [illegible] cited to the point that a customer of a [illegible] have been converted can have a [illegible] can be traced. There is, however, [illegible] to bring this case within that rule. [illegible] cited to the [illegible] Tolate of [illegible] cannot avail. [illegible] recovery of more than is allowed by the [illegible] will be affirmed.

O'Connor and [illegible], J.J., concur.

41007

CULLET CORPORATION OF AMERICA, a corporation,
Appellee,

v.

DAVID ROSENBERG,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

306 I.A. 267

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff, April 6, 1937, filed an amended statement of claim against Ajax Waste Paper Company, a corporation, and David Rosenberg. The claim contained two counts. The first charged that defendant used certain premises of plaintiff by piling junk of various kinds on it during the year beginning in April, 1936 and ending in March, 1937. Plaintiff demanded reasonable rental value of the premises, said to be $100 per month. The second count alleged a like use of the premises for a like period of time but charged that in depositing the junk defendants committed an unlawful trespass. Damages in a like amount were claimed.

Defendant answered denying the use of the premises and the trespass and denying the damages and other material allegations. At the close of the trial, plaintiff elected to stand on the first count and the second was dismissed.

The cause was tried by the court without a jury. The issues were found against David Rosenberg. The suit against the Ajax Company was dismissed. The court, overruling Rosenberg's motion for a new trial, found damages in the sum of $75, and entered judgment from which this appeal is taken.

It is urged there was error in the admission of evidence offered for plaintiff, first, as to certain photographs of the premises, and secondly, as to the copy of a certain letter, the original of which the evidence tended to show was in defendant's possession and which defendant upon notice failed to produce. The preliminary evidence was such as to make the admission of the photographs a matter

4007

CULLEY CORPORATION OF AFRICA,
a corporation,
Appellee,

v.

DAVID ROSENBERG,
Appellant.

No. 9007 Ia. 267

MR. PRESIDING JUSTICE ARTHURST DELIVERED THE OPINION OF THE COURT.

Plaintiff, Culley Corporation of Africa, filed an amended statement of claim against Alex Gertz [illegible], a corporation, and David Rosenberg. The claim contained two counts. In first count plaintiff claimed that defendant used certain [illegible] by filing lien of various kinds on it during the year [illegible] in April, 1927, and ending in March, 1927. Plaintiff demanded [illegible] value of the premises said to be [illegible] work. In second count alleged [illegible] the premises for a [illegible] time but charged that [illegible] the lien defendants [illegible] material improvements. [illegible] amount were claimed.

[illegible] trespass and [illegible] the close [illegible] and the second [illegible].

The [illegible] were found [illegible] was dismissed. [illegible] trial, found [illegible] which this [illegible].

It [illegible] offered for [illegible] lease, and second, [illegible] of which the evidence [illegible] which defendant [illegible] dence was such as to make [illegible] a matter

within the discretion of the trial judge. Brownlie v. Brownlie, 357 Ill. 117; People v. Herbert, 361 Ill. 64. We think the same may be said as to the letter. Richards Iron Works v. Glennon, 71 Ill. 11; Union Surety and Guaranty Company v. Tenney, 200 Ill. 349. Moreover, there was other competent evidence in the record sufficient to sustain the finding of the court.

It is urged the judgment of the trial court is not sustained by the preponderance of the evidence - that was a question for the trial court. In this court the question is whether the finding of the trial court is clearly and manifestly against the evidence. We have examined the evidence and do not think it is. The evidence shows Rosenberg is secretary of the Ajax Waste Paper Company, whose place of business is just across the street from vacant lots of which plaintiff is the lessee. It also appears Rosenberg was jointly interested with one Benjamin Shedroff in a deal whereby quite a number of steel stands were purchased from the World's Fair in October, 1934. Rosenberg made an arrangement with the Haywood-Wakefield Company by which these stands were placed in the warehouse of that concern, and Rosenberg paid the cost of warehousing the stands. Rosenberg had an interest in the stands in that he was to share in profits which might be made in the transaction. In fact, he testified that he was a partner. These stands were taken from the warehouse and placed on plaintiff's premises and were left there for some months over plaintiff's protest. The stands were removed from the warehouse by a truck of the Ajax Waste Paper Company. We shall not narrate the evidence of the witnesses in detail. The testimony of Rosenberg and his witnesses was evasive and uncertain, but the trial court saw and heard the witnesses, and we would not be justified in disturbing the finding.

It is said (citing a Minnesota case) that an action for use and occupation will not lie against a trespasser. Such it is admitted was the rule at common law, but the rule by statute in this state is otherwise. Ill. State Bar Stats. 1939, chap. 80, §1, p. 1954. This statute provides that rent may be recovered "when lands are held and

within the discretion of the trial judge. Brownlie v. Brownlie, 287 Ill. 117; People v. Herbert, 301 Ill. 64. I think the same may be said as to the letter. Hickory Iron Works v. Hannon, 71 Ill. 11; Union Surety and Guaranty Company v. Jensen, 200 Ill. 42. However, there was other competent evidence in the record sufficient to sustain the finding of the court.

It is urged the judgment of the trial court is not sustained by the preponderance of the evidence - that was a question for the trial court. In this court the question is whether the finding of the trial court is clearly and manifestly against the evidence. We have examined the evidence and do not think it so. The evidence shows Rosenberg is secretary of the Jax State Liquor Company, whose place of business is just across the street from vacant lots of which plaintiff is the lessee. It also shows Rosenberg and plaintiff jointly interested with one Benjamin Sedgroff in a local strictly milk & market of stuff stands were purchased from the Jewelite Sign in October, 1[illegible]. Rosenberg made an arrangement with the Jewelite - Sedgroff company by which these stands were placed in the vacant lots of the plaintiff, and Rosenberg paid the cost of erecting the stands. Rosenberg was interested in the stands in that he was to share in profits with plaintiff [illegible] the transaction. In fact, he testified that he was a partner. These stands were taken from the warehouse and placed on plaintiff's premises and were left there for some months after plaintiff's release. The stands were removed from the premises [illegible] [illegible] beats Paper Co. [illegible] shall not review the evidence at length [illegible] nesses in detail. The testimony of Rosenberg in his interest was evasive and unsatisfactory, and the trial court [illegible] the witnesses, and we would not be justified in disturbing the finding.

It is said (citing a Illinois case) that an action for use and occupation will not lie against a tenant [illegible]. It is admitted was the rule at common law, but the rule by statute in this state is otherwise. Ill. State Bar Stat. [illegible], chap. 3[illegible], [illegible]. This statute provides that rent may be recovered "upon leases not in writ-

occupied by any person without any special agreement for rent." Ill. Cent. R.R. Co. v. Thompson, 116 Ill. 159; Walsh v. Taylor, 142 Ill. App. 46. The judgment will be affirmed.

JUDGMENT AFFIRMED.

O'Connor and McSurely, JJ., concur.

occupied by any person without any special agreement for rent." 121.
Cent. R.P. Co. v. Thompson, 118 Ill. 189; -eld v. Taylor, 140 Ill.
App. 42. The judgment will be affirmed.

Affirmed.

O'Connor and McNurnly, JJ., concur.

41034

SAM SEIDMAN,
Appellant,

v.

FRED C. BACHTEL,
Appellee.

APPEAL FROM
COUNTY COURT,
COOK COUNTY.

306 I.A. 268

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

On October 19, 1938, defendant Bachtel filed in the office of the clerk of the County court of Cook county his appeal bond, reciting that September 29, 1938, Seidman recovered a judgment against Bachtel before a justice of the peace for $152.50, from which he (Bachtel) had taken an appeal to the County court. On November 28, thereafter, a transcript of proceedings in the justice court was filed but no summons was served on plaintiff as directed by the statute. (Laws of 1933, pp. 688-90; Smith-Hurd Anno. Stats., chap. 79, §1 of the act, §116 of the statute; and see Historical Notes, p. 496.) November 26, attorney for defendant mailed to attorney for plaintiff a notice that the appeal had been taken with copy of the summons.

March 27, 1939, on the court's own motion it was ordered that the appeal be dismissed for want of prosecution. June 26, 1939, Bachtel filed his petition in which he set up, among other things, that the appeal had been placed upon a preliminary call without notice contrary to Rule 17 of the County court and prayed that the order of dismissal be vacated and the cause reinstated on the docket for purpose of trial. Rule 17 of the County court does not provide that cases must be noticed for trial. It merely provides that causes will be placed for trial in their order on the trial calendar. On the same day the court granted the motion, vacated the order and stayed execution pending the outcome of the suit. July 14, 1939, the cause came on for hearing, and on motion of defendant, plaintiff not being in court, an order was entered dismissing the suit with judgment for costs against plaintiff.

July 19, 1939, plaintiff Seidman entered a special appearance by his attorney for the purpose as stated "of vacating the judgment order entered July 14th, 1939, and to expunge the order entered on June 26, 1939." July 25, 1939, after hearing, the court vacated and set aside the order entered March 27, 1939, and the order of July 14, 1939, and ordered the cause reinstated and directed that a summons issue against the appellee. The summons issued and was served on Seidman July 31, 1939, and the return filed with the clerk of the court on August 3, 1939. August 30, 1939, Seidman filed notice of appeal "from the order entered in this cause on the 26th day of June, 1939, in the County Court of Cook County, Illinois, wherein the order entered in this cause on March 27, 1939, dismissing the appeal was vacated and set aside and the cause set for trial," and also "from the order entered in this cause on the 25th day of July, 1939, wherein the order of March 27, 1939, was vacated and set aside and the cause reinstated." The prayer of the appeal is "that said orders of June 26, 1939, and July 25, 1939, may be reversed and ordered vacated and set aside and for nought considered, and that this cause being an appeal from a Justice of the Peace may be dismissed and the judgment of the Justice of the Peace obtained September 29, 1938, be affirmed."

Plaintiff contends that the orders of June 26 and July 25 are final and appealable orders. There is no report of proceedings in the record. We are not informed as to the theory upon which on June 26 the order of March 27, 1939, was vacated. Plaintiff contends that it could only have been by motion in the nature of a writ of error coram nobis, but this is not necessarily true. Every presumption is in favor of the action of the trial court. The trial court may have been of the opinion that on March 27, 1939, it was without jurisdiction upon a mere preliminary call to dismiss the appeal on its own motion. So far as the record shows neither party was present when the order was entered. Under the former statute cases in the Supreme court (Camp v. Hogan, 73 Ill. 228; Sheridan v. Beardsley et al., 89 Ill. 477) and cases in the Appellate court (Bridges and tructural

July 19, 1929, plaintiff Reidman entered a special appearance by his attorney for the purpose as stated "of vacating the judgment order entered July 14th, 1929, and to expunge the order entered on June 26, 1929." July 26, 1929, after hearing, the court vacated and set aside the order entered March 27, 1929, and the order of July 14, 1929, and ordered the cause reinstated and directed that a summons issue against the appellee. The summons issued and was served on Reidman July 31, 1929, and the return filed with the clerk of the court in August 5, 1929. August 30, 1929, Reidman filed notice of appeal "from the order entered in this cause on the 26th day of June, 1929, in the County Court of Cook County, Illinois, wherein the order entered in this cause on March 27, 1929, dismissing the appeal was vacated and set aside and the cause set for trial," and also "from the order entered in this cause on the 26th day of July, 1929, wherein the order of March 27, 1929, was vacated and set aside and the cause reinstated." The prayer of the appeal is "that said orders of June 26, 1929, and July 26, 1929, may be reversed and "related vacated and set aside and for nought considered, and that this cause being an appeal from a justice of the peace may be dismissed and the judgment of the justice of the peace obtained September 28, 1928, be affirmed."

Plaintiff contends that the orders of June 26 and July 26 are final and appealable orders. There is no report of proceedings in the record. We are not informed as to the theory upon which on June 26 the order of March 27, 1929, was vacated. Plaintiff contends that it could only have been by motion in the nature of a writ of error coram nobis, but this is not necessarily true. Very presumption is in favor of the motion of the trial court. The trial court may have been of the opinion that on March 27, 1929, it was without jurisdiction upon a mere preliminary call to dismiss the appeal on its own motion. So far as the record shows neither party was present when the order was entered. Under the former absolute rules in the supreme court (Deere v. Cowan, 74 Ill. 568; Sheridan v. Hopkins et al., 89 Ill. 477) and cases in the appellate court (Pierce and Stevens

Iron Workers Union v. Sigmund, 88 Ill. App. 344; Byers v. Humphrey, 96 Ill. App. 202, and Haller v. Muth, 223 Ill. App. 27), held in substance that the court was without jurisdiction to dismiss an appeal or make any order in the case adversely to either party without his consent until the appellee should have been summoned or entered his appearance. Beasley v. Pashea, 267 Ill. App. 434, seems to hold that dismissal for want of prosecution may be proper but that was not upon a preliminary call. Moreover, plaintiff was not present in court when the motion to set aside the order of March 27 was entered. The only party over whom the court had jurisdiction personally was defendant, who made the motion for reinstatement. Plaintiff's appearance was not entered until July 19. Plaintiff then made a motion to set aside the order of July 14 dismissing the suit, and this motion has been allowed. The motion was inconsistent with the theory that the court was without jurisdiction to set aside the order of March 27, 1939, dismissing the appeal for want of prosecution. Plaintiff's appearance although said to be special was a general appearance and gave the court jurisdiction of his person. It already had jurisdiction of defendant and the subject matter. There was a further order that summons issue which seems to us to have been unnecessary.

In the absence of a report of proceedings we can not hold that the orders appealed from are final. So far as this record shows the orders are merely interlocutory in their nature, and the appeal will, therefore, be dismissed.

APPEAL DISMISSED.

McSurely, J., concurs.

O'Connor, J.: I agree with the result.

Iron Workers Union v. Hanna, [illegible] Ill. App. [illegible]; [illegible] v. Company, [illegible] Ill. App. [illegible], and Keller v. [illegible], [illegible] Ill. App. [illegible], [illegible] in substance that the court was without jurisdiction [illegible] an appeal or make any order in the case [illegible] without his consent until the application should be [illegible] appearance. Beasley v. [illegible], [illegible] [illegible] hold that claimant for [illegible] a preliminary [illegible]. However, [illegible] when the motion to set aside the [illegible] only party over whom the court had jurisdiction [illegible] and, who made the motion for [illegible] was not subject until [illegible] [illegible] to set aside the order or [illegible] been allowed. The motion was [illegible] court was without jurisdiction [illegible] claims in the appeal for [illegible] although [illegible] court jurisdiction of the [illegible] tenant and his assignee [illegible] none have which [illegible] to be [illegible] unnecessarily.

[illegible] that the [illegible] the orders are merely [illegible] will, therefore, be [illegible].

Reversed, [illegible].

Affirmed, [illegible] with the [illegible].

41048

ARTHUR WICK, Trustee in Bankruptcy of the Estate of Karl F. Goy,
Appellant,

v.

ELIZABETH O. WEILER,
Appellee.

) APPEAL FROM
) MUNICIPAL COURT
) OF CHICAGO.

306 I.A. 268

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff, trustee in bankruptcy, sued to recover one-third of $3,000, which his statement of claim avers came into the hands of defendant, being due and owing to the deceased wife of the bankrupt; that title to the same passed to the bankrupt under the statute of Descents and Distributions (Ill. State Bar Stats. 1939, chap. 39, §1, par. 4, p. 1231) and the trustee is therefore entitled to recover it. Defendant filed an affidavit of merits denying liability. There was a trial by the court with finding for defendant and judgment from which plaintiff appeals.

There is practically no dispute as to the facts. The bankrupt is Karl F. Goy. His wife, Isabell M. Goy, was the sister of defendant, Elizabeth Weiler. Isabell M. Goy in her lifetime borrowed sums of money from her sister, the defendant. In particular it appears that in 1930 she borrowed from her sister $50, and in 1931 the sum of $900, which she agreed to repay with 6% interest. The two sisters and a brother, R. F. Schuster, had an interest in the estate of their father, consisting of a principal note for $20,500 with interest coupons, note and coupons being secured by a trust deed on Chicago property. The evidence does not show the actual value of this security. After borrowing these sums of money, Isabell M. Goy on June 15, 1931, by a writing under seal, conveyed all her right, title and interest in these securities to defendant, Elizabeth Weiler. Mrs. Goy never paid either principal or interest of the sums loaned to her by Mrs. Weiler. In 1936, Mrs. Goy died leaving as her only heirs at law and next of

41048

ARTHUR WICK, Trustee in Bankruptcy
of the Estate of Karl F. Coy,
Appellant,

v.

ELIZABETH O. MILLER,
Appellee.

APPEAL FROM
MINNEHAHA COUNTY
OF VERMONT.

806 F.A. 268

MR. PRESIDING JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

Plaintiff, trustee in bankruptcy, sued to recover one-third of $3,000, which his statement of claim avers came into the hands of defendant, being due and owing to the deceased wife of the bankrupt; that title to the same passed to the bankrupt under the statute of Descents and Distribution (Ill. State Bar Stats. 1939, chap. 39, §1, par. 4, p. 1931) and the trustee is therefore entitled to recover it. Defendant filed an affidavit of merits denying liability. There was a trial by the court with finding for defendant and judgment from which plaintiff appeals.

There is practically no dispute as to the facts. The bankrupt is Karl F. Coy. His wife, Isabell F. Coy, was the sister of defendant, Elizabeth Miller. Isabell F. Coy in her lifetime borrowed sums of money from her sister, the defendant. It particularly is undisputed that in 1930 she borrowed from her sister $[illegible], and in 1931 the sum of $900, which she agreed to repay with 6% interest. The two sisters and a brother, R. F. Schuster, had an interest in the estate of their father, consisting of a principal sum for $3,500 with interest coupons, note and coupons being secured by a trust deed on Minnesota property. The evidence does not show the actual value of this security. After borrowing these sums of money, Isabell F. Coy on June 10, 1931, by a writing under seal, conveyed all her right, title and interest in these securities to defendant, Elizabeth Miller. She never paid either principal or interest of the sums loaned to her by Mrs. Miller. In 1932, Mrs. Coy died leaving as her only heirs at law the husband of

kin her husband, Karl F. Goy, and a son, whose age and given name are not stated. Mrs. Goy died intestate. No administration has been had on her estate.

On February 9, 1938, Karl F. Goy was adjudicated a bankrupt, and subsequently plaintiff was appointed trustee of the bankrupt estate. In March, 1938, Mr. H. F. Schuster, a brother of Mrs. Goy and Mrs. Weiler, liquidated the trust deed constituting their father's estate. The share of each of the three was $3,000. Mrs. Weiler and Mr. Schuster talked together about the matter and decided that two-thirds of the $3,000 in amount which would have been the share of Mrs. Goy (had it not been assigned) should be used to purchase life insurance for the son. On February 25, 1938, Mr. Schuster drew his check for $2,000 on the Drovers National Bank to the order of Karl F. Goy, and Mr. Goy endorsed it to the order of the Northwestern Mutual Life Insurance Company in payment for such insurance. On March 3, 1938, Schuster made another check to Karl F. Goy for the sum of $1,000, which Goy at once endorsed and delivered to defendant, Mrs. Weiler, saying that it did not belong to him. Plaintiff cites authorities to the effect that the assignment of June 15, 1931, to defendant was only as collateral security investing her with a qualified interest. He cites the statute of Descents as above and authorities holding that the adjudication of Karl F. Goy as a bankrupt invested plaintiff with the title of all the property of the bankrupt, both real and personal, and says, "It is the earnest contention of plaintiff that under the law there can be no reason legal or equitable why plaintiff, who brings this suit for the benefit of the creditors of Karl F. Goy should not be entitled to one-third of the sum of $3,000, less the $950 loan of defendant plus interest at the legal rate of 5% from February 25, 1938; said amount being $683.33 plus interest as above."

We are not able to agree with this contention. The assignment to Mrs. Weiler on its face was absolute. It conveyed her entire legal interest in the estate of her father. It was prepared by an attorney, and the purpose of the assignment made some months after the

him for husband, Earl F. Joy, and a son, Roger [illegible] were not stated. Mrs. Joy died intestate. An administration has been had on her estate.

On February 8, 1926, Earl F. Joy - [illegible] husband, and subsequently plaintiff was appointed trustee of the husband's estate. In March, 1929, Mr. [illegible], a brother of Mr. Joy and Mrs. Waller, liquidated the trust [illegible] Trustee's estate. The share of [illegible] Mr. Waller and Mr. Schuster talked together about the matter and believed that two-thirds of the $3,000 in amount which would have the share of Mrs. Joy (had it not been assigned) should go [illegible] insurance for the son. On February [illegible] 1929, [illegible] for $2,000 on the property [illegible] and Mr. Joy endorsed it [illegible] life insurance company in payment [illegible] insurance. [illegible] Schuster made another [illegible] for the sum of [illegible], which Joy at once endorsed [illegible] that it did not belong [illegible] effect that the [illegible] collateral security [illegible] the statute of [illegible] indication of [illegible] title of all the property [illegible] says, "It is the [illegible] there can be no [illegible] this suit for [illegible] entitled to one-third [illegible] said amount being [illegible] plus interest [illegible].

[illegible] ment to Mrs. Waller on the [illegible] legal interest in the estate of [illegible] attorney, and the purpose of the [illegible]

sums of money had been loaned might well have been not only to secure the moneys loaned to Mrs. Goy by Mrs. Weiler but to place in Mrs. Weiler the entire property rights of Mrs. Goy in her father's estate. If this was the intention (and the care with which the assignment was prepared tends so to show) then the creditors of the husband would have no standing to complain. Mrs. Goy in this manner would avoid the cost of administration of her small but complicated estate, and the creditors of her husband would have no standing to complain.

On the other hand, if we regard the assignment as a mere security for the payment of moneys borrowed from Mrs. Weiler by Mrs. Goy, any interest which the heirs might take under the statute would be subject to the repayment in full of the moneys loaned with interest as agreed. The exact amount was not proved, but it is clear that the total sum with interest would be several hundred dollars more than Mrs. Weiler has received in distribution. It is clear, we think, that the equities between these parties can not be adjusted in a suit at law. Neither Mr. Schuster, who made the distribution, nor the son, who indirectly received the benefit of most of it, are parties to this action.

The judgment will be affirmed.

JUDGMENT AFFIRMED.

O'Connor and McBurely, JJ., concur.

sums of money had been loaned might well have been not only to secure the money loaned to Mrs. Joy by Mrs. Keller but to place in Mrs. Keller the entire property rights of Mrs. Joy in her father's estate. If this was the intention (and the case with which the assignment was prepared tends so to show) then the creditors of the husband would have no standing to complain. Mrs. Joy in this manner would avoid the cost of administration of her small but complicated estate, and the creditors of her husband would have no standing to complain.

On the other hand, if we regard the assignment as a mere security for the payment of moneys borrowed from Mrs. Keller by Mrs. Joy, any interest which the heirs might take under the estate would be subject to the repayment in full of the moneys loaned with interest as agreed. The exact amount was not proved, but it is clear that the total sum with interest would be several hundred dollars more than Mrs. Keller has received in distribution. It is clear, we think, that the equities between these parties can not be adjusted in a suit at law. Neither Mr. Demaster, who made the distribution, nor the son, who indirectly received the benefit of most of it, are parties to this action.

The judgment will be affirmed.

JUDGMENT AFFIRMED.

O'Connor and McNally, JJ., concur.

40897

and

40961

| | | |
|---|---|---|
| FRANK J. STASTNY, Appellee, | ) | |
| v. | ) | CONSOLIDATED APPEALS |
| FRANCIS KAREL, Appellant. | ) | FROM THE SUPERIOR COURT |
| Consolidated with | ) | OF COOK COUNTY. |
| FRANCIS KAREL, Appellant | ) | |
| v. | ) | |
| FRANK J. STASTNY, Appellee. | ) | 306 I.A. 269 |

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

October 5, 1929, Frank J. Stastny entered into a contract with Francis Karel with reference to the purchase of certain shares of bank stock; the deal fell through and each claimed that the other was in default; Karel sued Stastny in the Circuit court to recover damages for breach of the contract and the following day Stastny sued Karel in the Superior court, alleging that Karel had breached the contract. Karel's suit was transferred from the Circuit to the Superior court and the cases were consolidated for hearing; he filed there a counterclaim to the Stastny suit, identical with his complaint filed in the Circuit court. The cause was tried without a jury and the court found against Karel and entered judgment against him for $17,626.28; the clerk of the Superior court, on request of Stastny, issued a capias ad satisfaciendum which was given to the sheriff to execute on the body of Karel; Karel filed a petition asking that the capias be quashed; Stastny contested this motion and the court denied it; Karel appeals from this order and also asks that the judgment against him be reversed and judgment be entered here in his favor and against Stastny upon his counterclaim.

40897

and

40981

FRANK J. STANTNY,

Appellee,

v.

FRANCIS KAREL,

Appellant.

Consolidated with

FRANCIS KAREL,

Appellant

v.

FRANK J. STANTNY,

Appellee.

Mr. Justice McGoorty delivered the opinion of the court.

October 6, 1950. [illegible] contract with [illegible] amount of bank stock; the deal fell [illegible] in default; Karel [illegible] for breach of the contract [illegible] in the superior court, [illegible] Karel's suit was transferred [illegible] and the cases were consolidated [illegible] plaintiff to the trial [illegible] Circuit court. [illegible] against Karel [illegible] clerk of the [illegible] satisfactorily [illegible] of Karel; Karel [illegible] trial court [illegible] from this order [illegible] verdict and judgment [illegible] upon his counterclaim.

Karel and Stastny, with seven other men, on April 6, 1927, formed a syndicate of stockholders of the First National Bank of Berwyn; each of these held 60 shares of stock, making a total of 540 shares; the stock voting agreement provided it might be terminated by a writing signed by two-thirds of the parties; Stastny was secretary and Karel vice president of the bank.

In September, 1929, Stastny and Karel discussed the possibility of dissolving this syndicate, buying out the stock and entering into a new stock pooling agreement between themselves, each to take one-half the stock; this resulted in the agreement dated October 5, 1929, which is the basis of this litigation. It recites that Karel has received $12,000 from Stastny to apply on the purchase of stock in the First National Bank of Berwyn for Stastny until he (Stastny) held 195 shares, and Karel agrees "to get and deliver them to said Frank J. Stastny for the same amount for which I purchase them;" no commissions are to be charged, Stastny to add to the 195 shares the 60 shares which he then held, the price to be paid for the stock purchased not to exceed $190 per share without first consulting each other; Karel also agreed to purchase an additional amount to his present stock so that his total amount would equal the stock of Stastny, or 255 shares. The total amount of both holdings, or 510 shares, "which is over 50% of said bank stock is then to be pooled, and a syndicate or partnership agreement to be drawn and signed by both persons herein mentioned," to take effect on or before November 15, 1929. The purpose of the syndicate was to have the controlling vote in the bank. The contract proceeds, "If we should fail to agree to the wording of the syndicate agreement then we shall, each of us, take our shares of stock purchased, paying 1/2 of the total cost of same." For the faithful performance of the agreements the parties bound themselves each to the other in the penal sum of $20,000, "fixed as liquidated damages, to be paid by the defaulting party." This was signed by both Karel and Stastny in the presence of witnesses.

Karel says he purchased 195 shares of stock at $190 a share

Karel and Stanley, with [illegible] on [illegible] 6, 1922, formed a syndicate of stockholders of the First National Bank of Berryville; each of these held 80 shares of stock, [illegible] shares; the stock voting agreement provides it shall [illegible] of a writing signed by two-thirds of the parties; [illegible] vice president of the bank.

In September, 1929, [illegible] Karel dissolved the syndicate; bailing out the [illegible] into a new stock pooling agreement between [illegible], each to take one-half the stock; this resulted in the agreement [illegible] 6, 1929, which is the basis of this litigation. [illegible] has received $16,000 from [illegible] the proceeds of stock in the First National Bank of Berryville [illegible] 195 shares, and Karel [illegible] 195 shares. [illegible] Stanley for the same amount [illegible] are to be charged, Stanley to [illegible] which be then held, the [illegible] to exceed -100 per share without first [illegible]; Karel also agreed to purchase an additional [illegible] that his total [illegible] The total amount of both [illegible] of said bank stock in this [illegible] able agreement to be [illegible] to take effect on or [illegible] syndicate was to have the [illegible] proceeds, "If we sell [illegible] agreement then we shall, each of us, [illegible] change, paying 1/2 of the total [illegible] forbearance of the [illegible] other in the equal sum of [illegible] paid by the defaulting party." [illegible] Stanley in the presence of witnesses.

Karel says he purchased [illegible]

for Stastny, tendered them to Stastny and requested him to enter into the syndicate agreement and to pay to Karel the sum of $25,050, which, with $12,000 already paid by Stastny, constituted the total purchase price of the 195 shares; that the parties could not agree as to the wording of the syndicate agreement; that Stastny refused to enter into the agreement and refused to pay Karel $25,050, although Karel offered to deliver to Stastny the 195 shares of stock so purchased by him for Stastny upon the payment of this amount; that thereafter the First National Bank of Berwyn, consolidated closed in June, 1932, a receiver was appointed and an assessment made upon the shareholders of the bank and a judgment was recovered against Karel for $9,750 upon the 195 shares of stock Karel had purchased for Stastny. Karel claims that Stastny is indebted to him in the sum of $34,800 with interest, which is $25,050 plus the amount of this judgment.

Stastny's complaint alleges the execution of the agreement of October 5, 1929, the payment by him to Karel of $12,000 and the agreement of Karel to purchase an additional amount of stock to make his holdings equal to that of Stastny, to wit, 255 shares; that Karel purchased the stock but, although Stastny offered to pay Karel the balance due, Karel failed and neglected to turn over to Stastny the shares of stock purchased by Karel for him. Stastny asked judgment in the sum of $20,000 as liquidated damages, or in the alternative, $12,000 with interest.

Counsel for Stastny asserts that no stock at all was purchased by Karel for Stastny. The record does not support this statement. The evidence shows that Karel purchased stock from some 15 stockholders, ranging in amounts from 4 shares of stock to 60. The evidence went into these purchases in detail. The stock ledger accounts in the bank show the sales of the several persons to Karel and the certificates sold and dates of the transfers; also the certificates and stock book stubs with the dates of sales upon every certificate purchased; also Karel's stock ledger account in the bank showing the dates of these purchases; also the specific stock certificates issued

for Stearty, tendered them to Stearty and requested him to enter into the ajudicate agreement and to pay to Karel the sum of $22,000, which, with $12,000 already paid by Stearty, constituted the total purchase price of the 150 shares; that the parties could not agree as to the working of the ajudicate agreement; that Stearty refused to enter into the agreement and refused to pay Karel $22,000. Although Karel offered to deliver to Stearty the 150 shares of stock so uncovered by him for Stearty upon the payment of this amount; that thereafter the first National Bank of Sexwyn closed in June, [illegible], a receiver was appointed and an assessment made upon the shareholders of the bank and a judgment was recovered against Karel for $4,700 upon the 150 shares of stock Karel had purchased for Stearty. Karel claims that Stearty is indebted to him in the sum of $22,000 with interest, which is $25,080 plus the amount of this judgment.

Stearty's complaint alleges the execution of the agreement of October 5, 1929, the payment by him to Karel of $12,000 and the agreement of Karel to purchase an additional amount of stock to make his holdings equal to that of Stearty, to wit, 150 shares; that Karel purchased the stock but, although Stearty offered to pay Karel the balance due, Karel failed and neglected to turn over to Stearty the shares of stock purchased by Karel for him. Stearty asks judgment in the sum of $20,000 as liquidated damages, or in the alternative, $12,000 with interest.

Counsel for Stearty asserts that no stock at all was purchased by Karel for Stearty. The record does not support this statement. The evidence shows that Karel purchased stock from some 12 stockholders, ranging in amounts from a minimum of [illegible] to 50. The evidence went into these purchases in detail. The stock issued accounts in the bank show the sales of the several persons to Karel and the certificates sold and dates of the transfers; also the certificates and stock book stubs with the dates of sales upon every certificate purchased; also Karel's stock ledger account in the bank showing the date of these purchases; also the specific stock certificates issued

to him upon the cancelation of the certificates purchased. All of the documents in the case show beyond any reasonable question that Karel purchased the stock as he claims.

Counsel for Stastny contends in his brief that Karel refused to let Stastny have his stock; Stastny and his brother-in-law Mr. Zrna testified to this effect, while Karel and Frank Peterzelka, who signed as one of the witnesses to the agreement of October 5, testified that Karel had the stock ready for Stastny and offered to perform. Karel testified that November 15, 1929, he offered Stastny certificates aggregating 195 shares and requested Stastny to pay him the sum of $25,050 and accept delivery of the 195 shares. Stastny declined, giving as his excuse that his attorney had not completed drawing the "trust agreement." Moreover, Stastny in the second count of his amended complaint alleged under oath that on that date Karel had requested Stastny to pay him the sum of $25,050. This is hardly consistent with the claim that Karel refused to turn over these shares of stock to Stastny.

Stastny's counsel is evidently basing the claim of non-performance upon the fact that Karel did not physically and unconditionally tender the certificates to Stastny. When Karel purchased the stock from the various stockholders he made an arrangement with the National Bank of the Republic to secure a loan upon these certificates in a sufficient amount to pay the selling stockholders cash for their certificates. Karel also made an arrangement with the bank whereby upon the payment by Stastny of the $25,050, representing the balance due from him (after crediting $12,000 paid) on account of the 195 shares at $190 a share, this stock would be released from the collateral loan and delivered to Stastny. Stastny was told of this and acquiesced in this arrangement, saying that after a while "we can go down to the National Bank of the Republic and close the deal there." A Mr. Miller, an officer of the National Bank of the Republic, was tendered as a witness to prove this arrangement with the bank, but the court improperly sustained objections to his testimony, but the arrangement was

to him upon the cancellation of the certificates purchased. All of the documents in the case show beyond any reasonable question that Karel purchased the stock as he claims.

Counsel for Stanley contends in his brief that Karel refused to let Stanley have his stock; Stanley and his brother-in-law Mr. Zum testified to this effect, while Karel and Frank Waterkein, who signed as one of the witnesses to the agreement of October 2, testified that Karel had the stock ready for Stanley and offered to perform. Karel testified that November 16, 1966, he offered Stanley certificates aggregating 180 shares and requested Stanley to pay him the sum of $88,000 and accept delivery of the 180 shares. Stanley declined, giving as his excuse that his attorney had not completed drafting the "final agreement." Moreover, Stanley in the second count of his amended complaint alleged under oath that on that date Karel had requested Stanley to pay him the sum of $88,000. This is hardly consistent with the claim that Karel refused to turn over these shares of stock to Stanley.

Stanley's counsel is evidently basing the claim of non-performance upon the fact that Karel did not physically and unconditionally tender the certificates to Stanley. When Karel purchased the stock from the various stockholders he made an arrangement with the National Bank of the Republic to secure a loan upon these certificates in a sufficient amount to pay the selling stockholders cash for their certificates. Karel also made an arrangement with the bank whereby upon the payment by Stanley of the $88,000, representing the balance due from him (after crediting $15,000 and $1) on account of the 188 shares at $480 a share, this stock would be released from the collateral loan and delivered to Stanley. Stanley was told of this and acquiesced in this arrangement, saying that after a while "we can go down to the National Bank of the Republic and close the deal [illegible]." [illegible], an officer of the National Bank of the Republic, was tendered as a witness to prove this arrangement with the bank, but the court improperly sustained objections to his testimony. But the arrangement was

sufficiently proved by the testimony of Karel.

Under the contract between the parties there was no obligation upon Karel to pay out of his own pocket for the purchase of the shares of stock for Stastny. He only agreed to "get and deliver them to said Frank J. Stastny." It could hardly be expected in such transactions that Karel would carry these certificates with him physically. Stastny did not carry out this arrangement with the Bank of the Republic to pay $25,050 and take in his shares of stock.

The drafting of the syndicate or trust agreement between the parties was finally completed in January, 1930; Karel pointed out two objectionable features - one that required two-thirds of the parties to the agreement vote, whereas there were only two parties to the agreement in equal shares, - the other, that the draft provided for the deposit of 80 shares of stock on the part of both parties, with the penalty for non-performance. Stastny would not agree to changing these provisions. Karel then suggested that Stastny take his share of the stock and pay Karel the money for this in accordance with the agreement. Stastny stated he was going to take a trip to Florida and would straighten the matter out upon his return. In February, 1930, Karel caused to be transferred to Stastny 60 shares of this bank stock, which was the approximate amount of stock purchased by Karel for Stastny with the $12,000 given to him. Stastny refused to accept this.

Subsequently, in December, 1930, there was a merger of the First National Bank of Berwyn with three other banks in Berwyn. At that time Karel again asked Stastny for the purchase price of the stock purchased for him. Stastny refused and insisted on the repayment to him of the sum of $12,000. Sixty-four shares, the equivalent of the shares purchased with the $12,000 were withheld from the merger and were produced upon the trial uncanceled and still appear upon the books of the First National Bank of Berwyn as uncanceled.

The consolidated bank failed in June, 1932; the receiver brought suit against Karel and the other stockholders upon their stockholders' liability, and judgment was recovered against Karel. A part

sufficiently proved by the testimony of Karel.

Under the contract between the parties there was no obligation upon Karel to pay out of his own pocket for the purchase of the shares of stock for Stanty. He only agreed to "get and deliver them to said Frank L. Stanty." It could hardly be expected in such transactions that Karel would carry these certificates with his personally. Stanty did not carry out this arrangement with the loan of the Republic to pay $28,000 and take in his shares of stock.

The drafting of the evidence of that agreement between the parties was finally completed in January, 1930; Karel pointed out two objectionable features - one that required two-thirds of the parties to the agreement vote, whereas there were only two parties to the agreement in equal shares, - the other, that the draft provided for the deposit of 80 shares of stock on the part of both parties, with the penalty for non-performance. Stanty would not agree to changing these provisions. Karel then suggested that Stanty take his share of the stock and pay Karel the money for this in accordance with the agreement. Stanty stated he was going to take a trip to Florida and would straighten the matter out upon his return. In February, 1930, Karel caused to be transferred to Stanty by share of this bank stock, which was the approximate amount of stock purchased by Karel for Stanty with the $12,000 given to him. Stanty refused to accept this.

Subsequently, in December, 1930, there was a merger of the First National Bank of Berwyn with three other banks in Berwyn. At that time Karel again asked Stanty for the purchase price of the stock purchased for him. Stanty refused and insisted on the repayment to him of the sum of $[illegible]. His 84-share share, the equivalent of the shares purchased with the $12,000 were attached from the merger and were pronounced upon the total unprovided and still merger upon the books of the First National Bank of Berwyn as unencumbered.

The consolidated bank failed in June, [illegible] the receiver brought suit against Karel and the other stockholders on their stockholders' liability, and judgment was recovered against Karel. Years

of this judgment was an assessment against Karel upon the 195 shares which Stastny had agreed to pay for. This amounted to $9,750.

We have noted only the salient points at issue. They are questions of fact and the evidence introduced should have been confined to these questions. On the contrary an extraordinary mass of immaterial and irrelevant testimony was introduced on behalf of Stastny. The trial court commented upon this, repeatedly stating that the record was being filled with immaterial matters and reversible errors. The trial was commenced November 3, 1938, and did not conclude until March 8, 1939.

The brief filed on behalf of Stastny is not helpful and in many respects is confusing. A series of what is designated as "graphs" is inserted in the brief. Counsel for Karel properly describes these as "unintelligible" and "a masterpiece of confusion." These "graphs" tend to support the charge that they illustrate the confusion which pervaded the trial and how the trial court was led from the simple issues of the case into a trial of false issues, which finally led the court into an erroneous judgment.

Counsel for Karel attack the issuance of the capias. Our conclusion that the judgment against Karel must be reversed makes it unnecessary to discuss this point. However, if this were the only point in the case it would be necessary to hold that the capias was improperly issued under the recent decision in Ingalls v. Maklios, 373 Ill. 404.

We hold that Karel was not in default on the contract, and the judgment against him is reversed. The cause is remanded with directions to expunge the special findings of fact from the judgment order; the order entered June 16, 1939, denying the petition of Karel to quash the body capias, and the order of June 16, 1939, directing the sheriff to proceed to serve the capias are reversed and the cause is remanded with directions to the Superior court to order the capias quashed. We find that Stastny was the defaulting party from his obligation under the contract. The contract provided that the penal

of this judgment was an assessment against [illegible] on the [illegible] shares which Stanley had agreed to pay for. This [illegible] to [illegible].

We have noted only the salient points [illegible]. They are questions of fact and the evidence [illegible] has been confined to those questions. On the contrary, an extraordinary mass of immaterial and irrelevant testimony was introduced on behalf of Stanley. The trial court commented upon this, [illegible] that the record was being filled with immaterial matter. [illegible] The trial was commenced November [illegible], 1979, and did not conclude until March 3, 1980.

The brief filed on behalf of Stanley [illegible] and is many repeats is confusing. [illegible] is inserted in the brief. [illegible] as "multitigiform" and [illegible] "[illegible]" tend to support the claims [illegible] pervaded the trial and [illegible] issues of the case into a [illegible] the court into an [illegible].

Counsel for [illegible] conclusion that the judgment [illegible] unnecessary to discuss this point. However, [illegible] point in the case it could be [illegible] improperly issued under the [illegible] 275 XII, 404.

We hold that [illegible] the judgment against his [illegible] directions to strike the [illegible] order; the order [illegible] to quash the bond [illegible] the merits to proceed to [illegible] is remanded with directions to the [illegible] quashed. We find that Stanley was [illegible] obligation under the contract. The [illegible]

sum of $20,000 shall be "fixed as liquidated damages, to be paid by the defaulting party." Judgment will therefore be entered in this court against Frank J. [illegible]astny and in favor of Francis [illegible]arel in the amount of $20,000.

IN CASE NO. 40897 THE JUDGMENT IS REVERSED AND THE CAUSE REMANDED WITH DIRECTIONS - IN CASE NO. 40861 THE JUDGMENT IS REVERSED AND JUDGMENT IS ENTERED IN THIS COURT AGAINST DEFENDANT [illegible]ASTNY FOR $20,000.

O'Connor, C.J., and Patchett, J., concur.

sum of $20,000 shall be "fixed as liquidated damages, to be paid by the defaulting party." Judgment will therefore be entered in this court against Frank J. Stanley and in favor of Donald Jarel in the amount of $20,000.

IT IS SO ORDERED THIS FIFTH DAY OF JUNE, 1978.

THE CLERK WILL ENTER JUDGMENT ACCORDINGLY. - IN THE NO. 4,0001 THE JUDGMENT IS NOT A LIEN ON THE IT ENTITLES [illegible] TO ENTER JUDGMENT "FIXED" FOR $20,000.

O'Connor, P.J., and Matchett, J., concur.

41061

SAM LANG,
Appellant,

v.

ILLINOIS GREYHOUND LINES, INC., a Corporation,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

306 I.A. 269

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an adverse judgment in a case tried by the court without a jury.

He alleged and testified that on January 10, 1938, he purchased a ticket at Kankakee, Illinois, for passage to Chicago on one of defendant's buses; that he had with him a sack of furs; that he informed defendant's agent or steward in charge of baggage on the bus that the sack contained furs valued at $500; that it was agreed between the parties that defendant would check the sack as baggage, and plaintiff delivered the sack to the steward, receiving defendant's baggage check therefor; that upon his arrival in Chicago he presented his claim check at defendant's terminal and was told the bag could not be found and on demand it has never been delivered to him. He claims that the market value of the bag was $508.10, and asked for judgment.

Plaintiff introduced in evidence the claim check, which on one side reads, "PASSENGER'S CLAIM CHECK - FORM 404 CHGO - Present this claim check and claim your baggage at Chicago, Ill. - Baggage Liability $25.00 - Read Other Side - NO. 183495." On the other side are the words, "NOTICE TO PASSENGER." Then follow words limiting the liability of the company to $25, and, "Passengers are cautioned to claim baggage at destination shown on face of check immediately to avoid payment of storage charges. - Issued..... By.... p's Ex 2 id..... Steward or Driver."

Plaintiff says that before the bus reached Chicago he asked the steward whether he could leave his bag at the terminal in Chicago

SAM LANG,

Appellant,

v.

ILLINOIS CENTRAL RAILROAD CO., a corporation,

Appellee.

306 I.A. 289

MR. JUSTICE [illegible] delivered the opinion of the court.

Plaintiff appeals from an adverse judgment in a case tried by the court without a jury.

On August [illegible] plaintiff purchased a ticket at Gardner, Illinois, for passage to Kirkwood on one of defendant's buses; that he had with him a box of [illegible]; that he informed defendant's agent in charge of the office of the bus that the box contained [illegible] value of $800; that it was agreed between the parties that defendant would [illegible] the box; that plaintiff delivered the box to the stewardess, receiving defendant's baggage check therefor; that [illegible] the box was not found and he demanded it [illegible] that the market value of the box [illegible] judgment.

Plaintiff introduces in evidence the [illegible] one side reads, [illegible] this claim check [illegible] at Chicago, [illegible] liability [illegible] are the words, [illegible] liability of [illegible] claim baggage at destination [illegible] avoid payment of [illegible] charges. [illegible] stewards or drivers.

Plaintiff [illegible] that before [illegible] the stewards [illegible] could leave [illegible]

and get it later, and was told it would be all right to do so; that after reaching Chicago and doing his errands he presented his claim check to the baggage master and was told that the bag was not there and to call back later. Plaintiff called back several times but never got his bag.

Arnold Hodo, the steward on defendant's line on the occasion in question, denied he had any conversation with plaintiff or took a bag from him and put it in the rear of the bus; said he did not tell him the bag would be safe with him; he also denied having issued the claim check.

Defendant's principal defense was that the bag, or gunny sack of furs was merchandise and not baggage, and therefore,under the decisions, defendant was not liable.

The trial court, who heard and saw the witnesses, was of the opinion that plaintiff had the claim check introduced in evidence and that it represented some bag. The court, however, sustained defendant's contention that the bag contained merchandise and was not baggage; that defendant had no notice of this and under the decided cases defendant, under the circumstances, can not be held liable for the loss of merchandise.

That defendant is a common carrier in the state of Illinois is not disputed, and the law seems to be well established that baggage consists of those things that may be necessary for the convenience and comfort of the traveler, such as clothing and other personal belongings. A common carrier is not responsible for the loss of merchandise other than baggage unless it accepts the baggage or bag with notice of the fact that it contains merchandise and not baggage. In Michigan Central R. Co. v. Carrow, 73 Ill. 348, the court defined "baggage" as a trunk or valise, commonly used for the transportation of wearing apparel, but if in fact the receptacle contains merchandise the traveler is guilty of such fraud as to absolve the carrier from the liability of an insurer. The case also holds that the law im-

and get it later, and was told it would be all right to do so; that after reaching Chicago and doing, his errands he presented his claim check to the baggage master and was told that the bag was not there and to call back later. Plaintiff called and several times but never got his bag.

Arnold Todd, the checker [illegible] on the occasion in question, denied he had any conversation with plaintiff or took a bag from him and put it in the car; [illegible] did not tell him the bag would be safe with him; he [illegible] having issued the claim check.

Defendant's principal witness was that the bag, or nearly each of form was worthless and not baggage, and therefore, under the decisions, defendant was not liable.

The trial court, [illegible] of the opinion that plaintiff had to show good intentions in [illegible] and that it represented some [illegible]. The court, however, [illegible] defendant's contention that the bag contained worthless [illegible] not baggage; that defendant was notified of this [illegible] the leased cases defendant, under the [illegible] decisions, was not [illegible] for the loss of worthless [illegible].

That defendant is a common carrier [illegible] is not disputed, and the law seems to be well established [illegible] conclusive of those [illegible] necessary for the convenience and comfort of the traveling [illegible] and other personal belongings. [illegible] is not one [illegible] of merchandise other than [illegible] with notice of the fact that it contains merchandise [illegible]. In Michigan Central [illegible] v. Carter, [illegible] "baggage" as a trunk or valise, generally used for the purpose of wearing apparel, but it is [illegible] the traveler is guilty of such [illegible] the liability of an insurer. The [illegible] the in-

poses no obligation upon the carrier to make any inquiry as to the contents of the parcel and that when the traveler presents a parcel as baggage, whether contained in any "convenient mode of carrying baggage," it is upon the implied representation that it contains only baggage. The court held that the contract for carrying was simply for passage, with the usual personal baggage of the traveler.

This being the law, the question for the determination of the trial court was whether to accept plaintiff's statement that he notified the steward that his sack contained furs or merchandise and the denial of this by the steward. The court said he found "nothing in the record to show that they (the defendant) knew that this was furs, nothing there."

Plaintiff argues that no traveler would carry personal effects in a gunny sack, which would of itself give notice to the carrier that it was not personal baggage. Plaintiff testified that he went into defendant's baggage room in Chicago, where there were several other gunny sacks which had been checked, and felt them to determine whether it was his sack or someone elses, thus indicating that baggage in some instances was carried in gunny sacks.

The trial court is presumed not to have considered any incompetent evidence. Full opportunity was given to cross-examine defendant's witnesses and the weight and credit to be given the testimony were for the trial court. We cannot say that its conclusion was against the manifest weight of the evidence and the judgment will therefore be affirmed.

JUDGMENT AFFIRMED.

O'Connor, P.J., and Matchett, J., concur.

posse no obligation upon the carrier to make any inquiry as to the contents of the parcel and that when the traveler presents a parcel as baggage, whether contained in any conveyance made of carrying baggage, it is upon the implied representation that it contains only baggage. The court held that the contract for carrying was simply for passage, with the usual personal baggage of the traveler.

This being the law, the question for the determination of the trial court was whether to accept liability statement that he notified the steward that his baggage contained furs or merchandise and the denial of this by the steward. The court said in part "nothing in the record to show that they (the baggage) were not what they were, nothing more."

Interest argues that no traveler would carry personal effects in a gunny sack, that it would give notice to the carrier that it was not personal baggage. Interest contended that he sent in defendant's baggage room in Chicago, more than several other gunny sacks which had been present, and left, but to a leaving whether it was his sack or someone elses, the liability not depends in some instance was carried in gunny sacks.

The trial court is presumed not to have considered any incompetent evidence. Full opportunity was given to cross-examine defendant's witnesses and the weight and credit to be given the testimony were for the trial court. We cannot say that its conclusion was against the manifest weight of the evidence and the judgment will therefore be affirmed.

Judgment affirmed.

O'Connor, P.J., and Matchett, J., concur.

40826

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|---|---|---|
| PEOPLE OF THE STATE OF ILLINOIS, ex rel. OSCAR NELSON, Auditor of Public Accounts, | ) | |
| v. | ) | |
| UNION BANK OF CHICAGO, | ) | APPEAL FROM |
| | ) | CIRCUIT COURT, |
| VICTOR BARTOLI, SR., Guardian, Appellant, | ) | COOK COUNTY. |
| v. | ) | |
| HARRY R. SPELLBRINK, Receiver, Appellee. | ) | 306 I.A. 270 |

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Victor Bartoli, Sr., as guardian of the estate of his minor son, filed a petition in the liquidation suit seeking to have the claim of the guardian for $3,500 allowed as a claim to be paid out of the assets which were deposited by the Union Bank of Chicago with the Auditor of Public Accounts under the provisions of the Trust Companies act. (Pars. 287 to 304, chap. 32, Ill. Rev. Stats. 1939.) Harry R. Spellbrink, as receiver of the bank which is being liquidated by the Auditor of Public Accounts, filed his answer to the petition. The matter was referred to a master in chancery who took the evidence, made up his report and recommended that the claim be disallowed and the petition dismissed. Afterward a decree was entered in substantial compliance with the recommendation of the master, and the guardian appeals.

The record discloses that Victor Bartoli, Sr., was appointed guardian of his minor son's estate and had received $7,500 for personal injuries sustained by the son. There was a balance of $4,576.60 in the estate pending in the Probate court of Cook county. The money of the minor was on deposit with the Continental Bank in Chicago and it was sought to have $3,500 of it invested so as to draw interest. George F. Engelbreit, an attorney at law, represented the guardian and the evidence tends to show that he was looking about

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. OSCAR ERICKS, Auditor of
Public Accounts,

v.

UNION BANK OF CHICAGO,

---

VICTOR MARTOLI, Sr., Appellee.

v.

HARRY A. POELLNITZ, Appellee.

MR. JUSTICE [illegible] delivered the opinion of the court:

Victor Martoli, Sr., as modified of the notice of his mortgagee, filed a petition in the liquidation suit seeking to have the claim of the principal for $2,800 allowed as a claim to be paid out of the assets which were delivered by the Union Bank of Chicago with the Auditor of Public Accounts under the provisions of the Trust Companies Act. [illegible] 32½ to [illegible], [illegible]. [illegible] Harry A. Poellnitz, as receiver of the bank which is being liquidated by the Auditor of Public Accounts, [illegible] in answer to the petition. The matter was referred to a master in chancery who took the evidence, made up his record and recommended that the claim be disallowed and the petition dismissed. Afterwards a decree was entered in substantial compliance with the recommendation of the master. [illegible] appeals.

The record discloses that Victor [illegible] pointed guardian of his minor son, [illegible] for personal injuries sustained by the son. [illegible] $4,578.00 in the estate pending in the Probate Court of Cook County. The money of the minor was on deposit in the Union National Bank in Chicago and it was found to have $2,[illegible] of it [illegible] as drew interest. George T. Poellnitz, [illegible]

for a proper investment. There is some evidence that he looked at several pieces of property with a view of investing the $3,500 but they were found unsatisfactory. In this connection he spoke to an office associate, Harry Uingerick, who advised him that he had a client, Harold M. Beach, who apparently was a real estate broker and who frequented the office in his business dealings with Uingerick. Engelbreit was introduced to Beach. Among other things, Beach submitted two lots of vacant real estate which he represented were owned by Edward McLoughlin who apparently desired a loan. There appear in the record photostatic copies of two letters dated May 5, 1931, one of which purports to have been written by a man in the real estate mortgage business, addressed to Beach, and the other by a man in the investment business. One of them appraises the property at $9,000 and the other at $8,750. To make the loan it was decided that the property be conveyed to the Union Bank of Chicago, as trustee, by McLoughlin, and the bank executed a trust deed on the property securing the principal and coupon notes which it was to sign. August 4, 1931, McLoughlin executed a deed conveying the property in trust to the bank. On the same day, Engelbreit, as a notary public, took McLoughlin's acknowledgment to the deed. This deed, however, was not filed for record until October 27, 1931. August 10, 1931, the bank, by its president and assistant secretary, executed a trust agreement which recited that the bank, as trustee, was about to take title to the two lots in question and that when title was so taken, it would be held for the "ultimate use and benefit" of Harold M. Beach; that the bank would deal with the property "only when authorized to do so in writing" by Beach. August 11, 1931, the bank as trustee, executed a trust deed conveying the property to the Chicago Title and Trust Company, as trustee, to secure payment of the $3,500 note made by the bank, as trustee, due three years after date with interest at 6 per cent per annum, payable semi-annually. The trust deed was executed on behalf of the bank, as trustee, by its vice president and assistant secretary and acknowledged by them on the

for a proper investment. There is some evidence that he looked at several pieces of property with a view of investing the $7,000 but they were found unsatisfactory. In this connection he spoke to an office associate, Harry Hingerick, who advised him that he had a client, Harold [illegible] Mason, who apparently was a real estate broker and who frequented the office in his business dealings with Hingerick. Engelbrett was introduced to Mason. Among other things, Mason submitted two lots of vacant real estate which he represented were owned by Edward McLoughlin who apparently needing a loan. There appear in the record photostatic copies of two instruments dated May 8, 1921, one of which purports to have been signed by a man in [illegible] real estate mortgage business, addressed to Mason, and the other by a man in the investment business. One of these mentions the property of [illegible] and the other at $6,750. In each the loan is [illegible] that the property be conveyed to the Union Bank of Chicago, as trustee, by McLoughlin, and the bank executed a trust deed on the property securing the principal and coupon notes which it was to sell. Under [illegible] 4, 1921, McLoughlin executed a deed conveying the property in trust to the bank. On the same day, apparently, as a notary public, Mark McLoughlin's acknowledgment to the [illegible]. This deed, however, was not filed for record until [illegible], 1921. Subsequently, the bank, by its president and assistant secretary, executed a trust agreement which recited that the bank, as trustee, had agreed to take title to the two lots in question [illegible] it would sell [illegible] it would be held for the "ultimate use and benefit of [illegible] Beach; that the bank would deal with [illegible] authorized to do so in writing by Beach. Subject to, [illegible] trustee, executed a trust deed conveying the property to the Union Title and Trust Company, as trustee, to secure [illegible] note made by the bank, as trustee, due three years [illegible] interest at 8 per cent per annum, [illegible] trust deed was executed on behalf of the bank, [illegible] president and assistant secretary and [illegible] on the

same day, August 11, 1931, but was not filed for record until October 29, 1931. At the time of the execution of the trust deed the bank, as trustee, by its vice president and assistant secretary, executed the principal note for $3,500 and six interest coupons for $105 each. August 12, 1931, Beach wrote the bank, as trustee, authorizing and directing it to execute the principal and coupon notes in which, among other things, he said: "The trust deed is to be delivered to the undersigned who will record and order a continuation of the title and upon receipt of the proper papers showing that title is in you subject to the above trust deed you are to deliver the said notes to the undersigned."

August 18, 1931, Engelbreit, as attorney for the guardian of the estate, procured an order to be entered by the Probate court in which it is recited that the guardian "presents his petition" from which it appeared that January 13, 1931, the Probate court approved of a settlement for $7,500 in payment of the personal injuries suffered by the minor in October, 1929; that the court had approved disbursements from this money leaving a balance of $4,876.60 which was to be deposited in the Continental Bank in the name of the minor, there to remain until the further order of the court; that the court had advised that the money be invested so as to draw interest. The order further recited that it appearing to the court that the Union Bank of Chicago, as trustee, had applied to the guardian for a loan of $3,500 for three years and to secure payment of the loan had executed its principal promissory note and coupons dated August 11, 1931, due three years after date and to secure the payment the bank had executed a trust deed to the Chicago Title and Trust Company; that the guardian had caused an investigation to be made of the value of the two lots conveyed by the trust deed and that they were worth not less than $11,000 and "It further appearing to the Court that said premises are protected by a guarantee policy issued by the Chicago Title and Trust Company" and that the trust deed was a first lien on the premises; that the minor would not be of age during the three years, it was ordered that the money be drawn from the bank and the loan made.

same day, August 11, 1921, but she was [illegible] until August 20, 1921. At the time of the execution of the [illegible] trust, in trustee, he was also president [illegible] principal note for [illegible] August 12, 1921. Soon after the [illegible] directing it to execute the [illegible] other things, he said: "The trust [illegible] undersigned who will receive [illegible] upon receipt of the report [illegible] to the above trust [illegible] signed."

August 13, 1921, [illegible] the estate, [illegible] which it is [illegible] which it appeared [illegible] a settlement for [illegible] the minor in October, [illegible] from this money [illegible] posited in the [illegible] remain until the [illegible] that the money [illegible] realize that it [illegible] as trustee, [illegible] years and to [illegible] preliminary [illegible] after [illegible] deed [illegible] counsel on [illegible] vested in the trust [illegible] and its further [illegible] by a [illegible] and that the trust [illegible] would not be at [illegible] money be [illegible]

August 6, 1932, Beach wrote a letter to the bank authorizing and directing it, under the trust agreement, to deliver the principal and coupon notes to Engelbreit and they were so delivered August 8, 1932. August 24, 1931, Engelbreit and Beach executed an escrow agreement with the Chicago Title and Trust Company. It provided that the Title and Trust Company would pay out the money upon the signed order of Engelbreit and Beach and on the next day Engelbreit and Beach signed an order on the Title and Trust Company that it pay $1,595 to Beach, $1,900 to McLoughlin and retain $5 for its services, and the Chicago Title and Trust Company drew its checks for the two sums, delivered them and they were paid through the bank on which they were drawn.

May 4, 1937, a proceeding was brought in the Circuit court of Cook county by Frances M. Kelly, Lorena McLoughlin, (a spinster) and Edward J. McLoughlin, (a bachelor) as tenants in common, to register the title to the two lots in question under the Torrens law and to declare the purported deed executed by Edward McLoughlin to the bank, as trustee, and the trust deed executed by the bank securing the $3,500 indebtedness, as clouds upon the title and that they be removed on the ground that the purported deed by Edward McLoughlin was a forgery. John W. Gould, as successor in trust to the bank (the bank having gone into liquidation), was made defendant but he failed to file an appearance or answer and was defaulted. October 13, 1937, a decree was entered finding the deed which purported to convey the property to the bank was not executed by Edward McLoughlin, the father of the three persons who filed the proceeding, and who was the owner of the premises, and the trust deed in question, etc. were removed as clouds.

No part of the interest or principal of $3,500 was paid at any time. Engelbreit testified he made demand on the Union Bank for the principal note and coupons but was told they could not be delivered without Beach's signature; that he was still attorney of record for the guardian in the Probate court; that he found out the notes were 'uncollectible in 1932 or 1933. I do not remember now;' that he

August 6, 1932, Beech wrote a letter to the bank authorizing and directing it, under the trust agreement, to deliver the principal and coupon notes to Engelbrecht and they were so delivered August 8, 1932. August 24, 1931, Engelbrecht and Beech executed an escrow agreement with the Chicago Title and Trust Company. It provided that the Title and Trust Company would pay out the money upon the signed order of Engelbrecht and Beech and on the next day Engelbrecht and Beech signed an order on the Title and Trust Company that it pay $1,500 to Beech, $1,800 to Schoenpflug and retain $ for its services, and the Chicago Title and Trust Company drew its checks for the two sums, delivered them and they were paid through the bank on which they were drawn.

May 4, 1937, a proceeding was brought in the Circuit Court of Cook County by Frances E. Kelly, Lorena Schoenpflug, (a minister) and Edward J. Schoenpflug, (a bookkeeper) as tenants in common, to register the title to the two lots in question under the Torrens law and to declare the purported deed executed by Schoenpflug to the bank, as trustee, and the trust deed executed by the bank securing the $3,500 indebtedness, as clouds upon the title and that they be removed on the ground that the purported deed by Edward Schoenpflug was a forgery. John , Kenig, as successor in trust to the bank (the bank having gone into liquidation), was made defendant but as failed to file an appearance or answer and was defaulted. October 21, 1937, a decree was entered finding the deed which purported to convey the property to the bank was not executed by Edward Schoenpflug, the father of the three persons who filed the proceeding, and who was the owner of the premises, and the trust deed in question, etc. were removed as clouds.

No part of the interest or principal of $3,500 was paid at any time. Engelbrecht testified he was counsel for the Union Bank for the principal note and coupons but he told them they could not be delivered without Beech's signature; that he was still attorney of record for the guardian in the Probate court; that he found out the notes were unmerchantable as long ago [illegible]

talked a number of times with Judge Horner and his successor, Judge O'Connell about the matter. "I presented a petition in the Probate Court on May 20, 1937. That was not the first time I had been in the Probate Court on the matter." Since that "I made no effort to collect these interest coupons because at the time they were due, I did not have possession of them or the principal note. I first got possession of the principal note and interest coupons in August of 1932, after the bank was in receivership."

The master found that "McLoughlin and Beach perpetrated a swindle and, while Engelbreit participated, he had no guilty knowledge, but was misled and imposed upon through the machinations of Beach and McLoughlin," and further that the "Union Bank of Chicago was not, throughout this transaction, guilty of negligence, but was innocently used as an instrument to perpetrate a fraud. Said bank did not warrant to anybody that it had good title to said real estate." Among other things, the master recommended that his fees be paid by the receiver in due course of administration. The receiver objected to this. The objection was overruled but on the coming in of the master's report, the court sustained the receiver as to this item, but in all other respects followed the master's report and entered a decree substantially in accordance therewith.

The evidence is to the effect that McLoughlin (who purported to own the property) and Beach, called at the bank and executed papers in connection with the transaction. Engelbreit also was at the bank. Some of the officials of the bank executed the papers and none of them was called as a witness nor did anyone from the bank testify.

We are unable to agree with the finding of the master as to the conduct of Engelbreit. He appeared before the Probate court with a petition of the guardian and there represented that the two lots were worth $11,000 when neither of the two appraisals valued the property at more than $9,000; that the title to them had been guaranteed by the Chicago Title and Trust Company, all of which he knew was not the fact, and his explanation is that he decided to save the ex-

talked a number of times with Judge Sumner and the deceased, Judge O'Connell about the matter. It proceeded [illegible] in the Probate Court on May 20, 1927. That was not the first time [illegible] been in the Probate Court on the matter. [illegible] effort to collect these interest [illegible] not have possession of [illegible] possession of the [illegible] 1929, after the bank [illegible].

The matter [illegible] available and, while [illegible] indebtedness, but was [illegible] honor and obligation, [illegible] was not, [illegible] innocently used as [illegible] did not warrant to [illegible] able." [illegible] be paid by the [illegible] objected to it. [illegible] of the matter's [illegible] item, but in all [illegible] entered a decree [illegible].

The evidence [illegible] to own the property [illegible] in connection [illegible] home of the [illegible] then was called [illegible].

We are [illegible] the conduct of [illegible] a petition of [illegible] were worth [illegible] property at more than [illegible] tead by the Chicago Title and [illegible] not the fact, as his explanation [illegible]

pense of the guaranty policy. But this does not square with the fact that he had led the Probate court to understand that the policy had in fact been issued, and further he authorized the Chicago Title and Trust Company to pay the $3,500 without receiving the $3,500 note and coupons, the finding was wholly unwarranted. We are also unable to agree that the bank was not guilty of negligence and that the only duty it had to perform was to sign papers which were presented to it, which seems to have been the view taken by the master. We think that people dealing with a bank, as trustee, as in the instant case, ought to be able to place a great deal of confidence in such transactions. The evidence shows that August 12, 1931, Beach wrote the bank, as his agreement with the bank provided, authorizing and directing them to execute the trust deed and notes; that the trust deed was to be delivered to Beach who would record it and order a continuation of the title "and upon receipt of the proper papers showing that title is in you subject to the above described trust deed" the bank would then deliver the notes to Beach. So far as the record discloses, no such continuation was made and no showing made to the bank that the trust deed was a first lien on the property.

We are further of opinion that the bank was not authorized to rely on what Engelbreit told it. The bank cannot contract against any liability that resulted from its own negligence. We think the overwhelming weight of the evidence is that the bank was guilty of negligence. In reaching this conclusion we have in mind the rule of law that where the findings of the master are approved by the chancellor, they will not be distrubed unless manifestly against the weight of the evidence. Fasedach v. Auw, 364 Ill. 491; Kosakowski v. Bagdon, 369 Ill. 252; Met. Life Ins. Co. v. Shattes, 298 Ill. App. 336; Zamis v. Hanson, 302 Ill. App. 404. But in the instant case all of the evidence, except the testimony of Engelbreit, is documentary, so that we are in as good position to determine the truth of the matter in controversy as were the master and the chancellor.

pense of the guaranty policy. But this does not conform with the fact that he had led the Probate Court to understand that the policy had in fact been issued, and further he authorized the Chicago Title and Trust Company to pay the $5,500 without receiving the $7,850 note and coupons, the finding was wholly unwarranted. [illegible] also unable to agree that the bank was not guilty of negligence in that the only duty it had to perform was to place papers which were delivered to it, which seems to have been the view taken by the master. We think that people dealing with a bank, as trustee, as in the instant case, ought to be able to place a great deal of confidence in such transactions. The evidence shows that August 11, 1921, Leech wrote the bank, as his agreement with the bank provided, authorizing and directing them to execute the trust deed and deliver the trust deed and to be delivered to Brown who would record it and secure a continuation of the title "and upon receipt of the report showing that title is in you subject to the above described trust deed" the bank would then deliver the notes to Leech. So far as the record discloses, no such continuation was made and no showing made to the bank that the trust deed was a first lien on the property.

We are further of opinion that the bank was not authorized to rely on what Meinhardt told it. The bank cannot recover against any liability that resulted from its own conduct. We think the overwhelming weight of the evidence is that the bank was guilty of negligence. In reaching this conclusion we have in mind the rule of law that where the findings of the master are approved by the chancellor, they will not be disturbed unless manifestly against the weight of the evidence. Jackson v. Ring, 78 Ill. 431; Greenhood v. Baughn, 269 Ill. 2; Ins. Life Ins. Co. v. Shelton, 284 Ill. 100; Zante v. Hanson, 90 Ill. App. 404. But in the instant case all of the evidence, except the testimony of Meinhardt, is documentary, so that we are in as good position to determine the truth of the matter in controversy as were the master and the chancellor.

For the reasons stated, the decree of the Circuit court of Cook county is reversed and the matter remanded with directions to allow the claim as a trust claim under the Trust Companies act.

REVERSED AND REMANDED WITH DIRECTIONS.

Matchett, P.J., and McSurely, J., concur.

ADDITIONAL OPINION ON REHEARING BY MR. JUSTICE O'CONNOR.

After the foregoing opinion was filed, counsel for the receiver of the bank filed a petition for a rehearing. The rehearing was allowed to reconsider the question whether the negligence of the bank, under the circumstances disclosed by the evidence, authorized the allowance of the claim under the Trust Companies act. [Chap. 32, par. 287, et seq., Ill. Rev. State. 1939.]

The record discloses that "Edward McLoughlin, widower," executed a warranty deed conveying the premises in question to the bank, as trustee, and although this deed is dated and acknowledged on August 4, 1931 by the grantor, it is recited in the deed that the conveyance is made "under the provisions of a trust agreement dated the 8th of August, A.D. 1931, known as Trust No. 4454." The trust agreement, which is in the record, however, is dated August 10, 1931, "and known as Trust No. 4454;" recites that the Union Bank of Chicago "is about to take title" to the property in question and when it has taken title it will hold "it for the ultimate use and benefit" of Harold E. Beach and that it will deal with the property "only when authorized to do so, in writing," from Beach or the written direction of the beneficiary or beneficiaries; that the bank is to receive for its services $40 for taking title and accepting the trust and $5 per year thereafter was allowed as long as the property is held by it in trust and "the regular schedule fees for making deeds; and it shall receive reasonable compensation for any special services rendered by it and its attorneys, solicitors and agents hereunder."

August 12, 1931, Beach wrote a letter to the bank, as

For the reasons stated, the decree of the circuit court of Cook county is reversed and the matter remanded with directions to allow the claim as a trust claim under the trust companies act.

REVERSED AND REMANDED WITH DIRECTIONS.

Mathews, P.J., and McGuire, J., concur.

ADDITIONAL OPINION ON REHEARING.

After the foregoing opinion was filed, counsel for the receiver of the bank filed a petition for a rehearing. The rehearing was allowed to reconsider the question whether the insolvency of the bank, under the circumstances disclosed by the evidence, authorized the allowance of the claim under the trust companies act. (Ill. Rev. Stat. 1931, par. 227, et seq., Ill. Rev. Stat. 1931.)

The record discloses that "Grace Colonnitin, widower," executed a warranty deed conveying the premises in question to the bank, as trustee, and although this deed is dated and acknowledged on August 4, 1931 by the grantor, it is evident in the deed that the conveyance is made "under the provisions of a trust agreement dated the 4th of August, A.D. 1931, known as trust no. 4494." The trust agreement, which is in the record, however, is dated August 10, 1931, "and known as Trust No. 4494;" recites that the grantor herein of "intends to about to take title" to the property in question and upon it the bank title it will hold "it for the ultimate use and benefit" of Carlo G. Bacon and that it will deal with the property only as authorized to do so, in writing, from Bacon or the written direction of the beneficiary or beneficiaries; that the bank is to receive for its services and for taking title and accepting the trust and to perform ministerial acts allowed as long as the property is held by it in trust one "the regular schedule fees for making deeds; and it shall receive reasonable compensation for any special services rendered by it and its attorneys, solicitors and agents hereunder."

August 12, 1931, Bacon wrote [illegible] as

trustee, authorizing and directing it under the trust agreement to prepare the principal note for $3,500, dated August 11, 1931, due three years after date, with interest at the rate of 6% per annum, payable semi-annually, to be evidenced by interest coupons, together with a trust deed to the Chicago Title & Trust Co. to secure the payment of principal and interest. The letter continued: "The trust deed is to be delivered to the undersigned who will record same and order a continuation of the title and upon receipt of the proper papers showing that title is in you subject to the above described trust deed you are to deliver the said notes to the undersigned."

Pursuant to this authorization the bank, as trustee, executed a trust deed to the Title & Trust Co. dated August 11, 1931, which was acknowledged on the same date by the officials of the bank but it was not filed for record until October 29, 1931. The trust deed refers to trust agreement #4454 and describes the principal note and coupons; that the trust deed is made for the purpose of securing the payment of the principal sum and interest and the guarantor "does, by these presents, grant, remise, release, alien and convey" etc. and "This Trust Deed is executed by the Union Bank of Chicago, as Trustee as aforesaid in the exercise of the power and authority conferred upon and vested in it as such Trustee (and said Union Bank of Chicago hereby warrants that it possesses full power and authority to execute this instrument), to bind the trust estate as herein set forth and not individually." On the same day, August 11, the bank executed the principal note and coupons. In the principal note it is stated: "This note is executed by UNION BANK OF CHICAGO, as Trustee as aforesaid in the exercise of the power and authority conferred upon and vested in it as such Trustee to bind the trust estate as herein set forth and not individually, and is payable only out of the property specifically described in said Trust Deed."

The Probate court entered an order August 18, 1931, in the estate of the minor in which it found that $7500 had been paid the guardian for personal injuries to the minor and that $4576.60 of the

trustee, authorizing and directing it under the trust agreement to prepare the principal note for $3,800, dated August 11, 1921, due three years after date, with interest at the rate of 8% per annum, payable semi-annually, to be evidenced by interest coupons, together with a trust deed to the Chicago Title & Trust Co. to secure the payment of principal and interest. The letter continued: "The trust deed is to be delivered to the undersigned who will record same and order a continuation of the title and upon receipt of the abstract paperc showing that title is in you subject to the above mentioned trust deed you are to deliver the note notes to the undersigned."

Pursuant to this authorization the bank, as trustee, executed a trust deed to the Title & Trust Co. dated August 11, 1921, which was acknowledged on the same date by the officials of the bank but it was not filed for record until October 3d, 1921. The trust deed refers to trust agreement dated and describes the principal note and coupons; that the trust deed is made for the purpose of securing the payment of the principal sum and interest and the guarantor fees, by these presents, grant, convey, release, alien and convey" etc. and "This Trust Deed is executed by the Union Bank of Chicago, as Trustee as aforesaid in the exercise of the power and authority conferred upon and vested in it as such Trustee (and said Union Bank of Chicago hereby warrants that it possesses full power and authority to execute this instrument), to bind the trust estate as herein set forth and not individually." In the same way, Article II, the bank executed the principal note and coupons. In the principal note it is stated: "This note is executed by Union Bank of Chicago, not individually, as aforesaid in the exercise of the power and authority conferred upon and vested in it as such Trustee to bind the trust estate in herein set forth and not individually, and is payable only out of the property specifically described in said Trust Deed."

The Probate court entered an order on [illegible] 1, 1925, in the estate of the minor in which it found it "and that [illegible] said the guardian for personal injuries to the minor and that $[illegible].00 of the

money was then on deposit in the Continental Illinois Bank & Trust Co., subject to the further order of the court; that the guardian had presented a petition that $3,500 of the money be loaned to the Union Bank of Chicago, as trustee, for a term of three years; that the Union Bank had executed a promissory note, coupons and trust deed to secure the payment thereof, on August 11, 1931; that the property in question was worth not less than $11,000; that the title to the property had been guaranteed by a policy issued by the Chicago Title & Trust Co., "that said Trust Deed is a first lien on said premises;" and it was ordered and decreed that the guardian be authorized and directed to withdraw $3,500 from the Continental Bank to be loaned to the Union Bank, as trustee, and that the Union Bank take and hold as security the note and trust deed; that the loan was to be a first lien on the property.

The $3,500 was placed in escrow with the Chicago Title & Trust Co., and pursuant to the escrow agreement, was paid out by the Title & Trust Co. August 25, 1931, on the written order of Beach and Engelbreit (the attorney for the estate); $1,900 to McLoughlin and $1,595 to Beach, as above stated, and $5 was retained for its services.

August 8, 1932, there appears in the record what purports to be a letter from Beach to the Union Bank of Chicago authorizing and directing it to deliver the principal note and coupons to Engelbreit, who testified he received them from the bank August 8, 1932.

From the foregoing we think it clear that the bank was grossly negligent throughout its dealings in the matter. So far as the record discloses, the principal note and coupons remained in its possession for about a year after they were executed. No one connected with the bank was called to testify. Afterward, although suit was brought, as above stated, to remove the trust deed as a cloud on on the real estate, on the ground that the deed conveying the property to the bank, as trustee, was a forgery (to which proceeding the receiver of the bank was a party), the receiver did nothing but permitted the case to go by default. No explanation of this is made nor is any showing made by plaintiff or defendant in the instant case as to what became of Beach or who the person was who executed the deed to

money was then on deposit in the commercial Illinois Bank a trust co., subject to the further order of the court; that the creditor had presented a petition that $3,800 of the money be loaned to the Union Bank of Chicago, as trustee, for a term of three years; that the Union Bank had executed a promissory note, coupons and trust deed to secure the payment thereof, on August 11, 1921; that the property in question was worth not less than $11,000; that the title to the property had been guaranteed by a policy issued by the Chicago Title and Trust Co., that said Trust Deed is a first lien on said premises; that it was ordered and decreed that the guardian be authorized and directed to withdraw $3,800 from the Commercial Bank to be loaned to the Union Bank, as trustee, and that the Union Bank then be authorized to execute the note and trust deed; that the loan was to be a first lien on the property.

The $3,800 was loaned in accordance with the decree, the Trust Co., and pursuant to the court order, was paid out by the Title & Trust Co. August 25, 1921, on the written order of Moses and Sugarbrodt (the attorney for the creditor); $1,[illegible] to [illegible] and $1,382 to Moses, as above stated, and $[illegible] for the services.

August 6, 1926, there appears in the record [illegible] letters to be a letter from Moses to the Union Bank of Chicago [illegible] and directing it to notify the creditors that the [illegible] to employ, who testified he received the [illegible] from the bank [illegible] 6, 1926.

From the foregoing, we think it clear that the bank was grossly negligent in [illegible] in the matter. As far as the record discloses, the creditor did not [illegible] in its possession for about [illegible] after the [illegible] was [illegible] dealt with the bank as the owner of the [illegible] was brought, as above stated, to [illegible] a claim to on the real estate, on the ground that [illegible] property to the bank, as trustee, was a forgery (the [illegible] the receiver of the bank was a party). The receiver [illegible] settled the case to go by default. No explanation of [illegible] is any showing made by plaintiff or [illegible] to what became of Moses or who the person [illegible] the deed to

the bank.

Counsel for the receiver say: "The relationship between the bank and the Estate of Victor Bartoli, Jr., was that of Seller and Purchaser only, and no relationship existed between them which could give rise to a claim secured under the Trust Companies Act;" that the question is "whether an express trust was created between the bank and the Estate of said minor;" and that "Estoppel can not result in a claim under the Trust Companies Act." Counsel further say that the "Title to the vacant real estate never vested in the bank, consequently there was no trust res, which is indispensable to the creation of an express trust and to the allowance of a claim under the Trust Companies Act."

By the first section of the act, trust companies "may be appointed assignee or trustee by deed, and executor, guardian or trustee by will" and section 6 of the act provides that securities which are required to be deposited with the Auditor of Public Accounts shall "be for the benefit of the creditors of said company."

In the instant case the Union Bank of Chicago was appointed "trustee by deed" within the meaning of section 1 of the act, and the guardian who filed his claim against the defunct bank is a creditor within the meaning of section 6 of the act. By order of the Probate court, the guardian was authorized to loan the money to the Union Bank, as trustee, on its note and trust deed. The bank, in executing the notes and trust deed, represented that it was authorized to do so; that it had title to the property and it can not now be heard to say as against plaintiff that no title vested in it.

The conclusion we reached in the original opinion and what we there said, is re-affirmed.

The decree of the Circuit court of Cook county is accordingly reversed and the matter remanded with directions to allow the claim under the Trust Companies act.

REVERSED AND REMANDED WITH DIRECTIONS.

Matchett, P.J., and McSurely, J., concur.

the bank.

[illegible]

[illegible]

41022

ESTHER MOSHER,
Appellant,

v.

JOSEPH KANTOR, et al.

NATIONAL VAN LINES, INC.,
Garnishee,
Appellee.

APPEAL FROM THE
MUNICIPAL COURT
OF CHICAGO.

306 I.A. 271

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an original action of attachment against Joseph Kantor to recover $180 claimed as rental for the months of April and May, 1939. The National Van Lines, Inc., was served as garnishee. Apparently Kantor had moved to California from Milwaukee and so far as the record discloses, no attempt was made to serve him. The garnishee was served and answered interrogatories. Apparently there was some sort of hearing and on motion of the garnishee, an order was entered quashing the writ of attachment, discharging the garnishee and plaintiff appeals.

The record before us is unsatisfactory and it is uncertain as to what actually took place in the trial court. Plaintiff in her statement of claim alleged that defendant, Kantor, owed her $180 for rent for the months of April and May, 1939, "pursuant to the terms of the lease attached hereto and expressly made part hereof." There is no lease attached and none is in the record.

The garnishee, in answer to one of the interrogatories filed by plaintiff, said that at the time of the service of summons it had in its possession certain articles of furniture which were placed with the garnishee for shipment to San Francisco under contract "signed by Sue L. Kantor" and that the garnishee did not have sufficient knowledge as to who was the actual owner of the furniture. Afterward the garnishee filed a verified, amended answer in which it stated that at the time of service of the writ "it had in its possession house-

PETRUS MOSHER,
Appellant,

v.

JOSEPH LAMPON, et al.

NATIONAL VAN LINES, INC.,
Garnishee,
Appellee.

MR. JUSTICE O'CONNOR [illegible]

Plaintiff brought an original action [illegible] judgment against Joseph Lampon to recover the balance due for the months of April and May, 1964. The National Van Lines, Inc., was served as garnishee. Apparently Lampon had moved to California. Thereafter and so far as the record discloses, he refused to pay to serve him. The garnishee was served and answered. [illegible] there was some sort of [illegible] order was entered [illegible] garnishee and plaintiff [illegible].

The record [illegible] as to what actually [illegible] statement of [illegible] real for the [illegible] the [illegible] no issue attached and [illegible].

The garnishee, [illegible] by plaintiff, said that [illegible] in the possession certain articles of [illegible] the garnishee for [illegible] one L. Lampon, and that the garnishee [illegible] ledge as to the [illegible] garnishee filed a verified, [illegible] at the time of service of the [illegible]

300 I.A.-271

hold furniture which was delivered" to it "as warehouse man, by Sue L. Kantor, the owner thereof, and a negotiable receipt or order was issued for them" to Sue L. Kantor, and that the receipt or order had not been surrendered prior to the issuance of the attachment writ; that "under and by virtue of section 254 [par. 257] of Chapter 114", Ill. Rev. Stats. 1939, the furniture was not subject to garnishment unless the receipt or order which it issued to Sue L. Kantor, was first surrendered. On the day the amended answer was filed, the court entered the following order: "Now comes the garnishee herein and moves the Court to quash attachment writ, and the Court being fully advised in the premises, sustains said motion, and attachment quashed and garnishee, Nat'l Van Lines, Inc., a corp., discharged as garnishee in this cause." It is from this order that plaintiff filed her notice of appeal.

After plaintiff had filed the record, abstract and brief, the garnishee filed its motion to strike the report of the proceedings. The motion was allowed for the reason that the report was not signed by the trial judge or any other judge and in addition the trial judge afterwards certified that the report was incorrect and that he had signed a correct report December 27, 1939. Afterward the garnishee filed a motion in this court for an order directing plaintiff to bring the new report of proceedings filed December 27, 1939, before this court. The motion was denied. It was the duty of the garnishee to file the report here under the circumstances. The garnishee then moved that the appeal be dismissed but the motion was denied. Other motions were made which we do not mention here and we only refer to some of them to show the unsatisfactory state of the record.

From the several motions made in this court, it appears that on the motion to quash the writ and discharge the garnishee, a bill of lading for the household furniture was produced and exhibited to the court, and that the receipt issued by the garnishee for the furniture, which appears in the report of the trial (which was stricken),

hold furniture which was delivered to it by the [illegible]
L. Kanfor, the owner thereof, [illegible]
issued for them to be [illegible]
not been surrendered prior to the issuance of the [illegible]
that "under and by virtue of section [illegible]
III, Nov. Stats. 1939, the furniture was not [illegible]
unless the receipt or order which it [illegible]
first surrendered. On the day the [illegible]
entered the following order: [illegible]
move the Court to quash [illegible]
advised in the premises, [illegible]
and guarantee, and's can [illegible]
in this cause." It is from [illegible]
of appeal.

After plaintiff was filed [illegible]
the garnishee filed its motion to [illegible]
The motion was allowed for the reason that [illegible]
by the trial judge or any other judge [illegible]
afterwards certified in [illegible]
signed a correct report [illegible]
filed a motion in this court [illegible]
bring the new report of [illegible]
the court. The motion was [illegible]
to file the report here [illegible]
moved that the [illegible]
motions were made [illegible]
some of them to show the [illegible]

From the several motions [illegible]
on the motion to quash [illegible]
of judge for the trial [illegible]
the court, and that the receipt [illegible]
furniture, which appears in the [illegible]

was not the document exhibited to the court at the time.

The brief and argument filed by plaintiff is predicated almost wholly on the theory that the report of the trial was properly in the record, but that report was afterward stricken on motion of the garnishee, as above stated, so that the argument in plaintiff's brief is almost entirely inapplicable.

The garnishee in its brief contends that its motion to dismiss the appeal should have been allowed for the reason that no final judgment was entered. We have re-examined the motion and in view of the confused state of the record, we think the motion should have been sustained. No judgment has been entered in the main case and if the defendant should prevail then the garnishment would fall. Brignall v. Merkle, 296 Ill. App. 250.

The motion of the garnishee to dismiss the appeal is sustained and the appeal is dismissed.

APPEAL DISMISSED.

Matchett, P.J., and McSurely, J., concur.

was not the document exhibited to the court at the time.

The brief and argument filed by plaintiff is predicated almost wholly on the theory that the report of the trial was properly in the record, but that report was afterward stricken on motion of the garnishee, as above stated, so that the argument in plaintiff's brief is almost entirely inapplicable.

The garnishee in its brief contends that its motion to dismiss the appeal should have been allowed for the reason that no final judgment was entered. We have re-examined the motion and in view of the contrived state of the record, we think the motion should have been sustained. No judgment had been entered in the main case and if the defendant should prevail then the garnishment would fail. Grimell v. Perkins, 296 Ill. App. 224.

The motion of the garnishee to dismiss the appeal is sustained and the appeal is dismissed.

APPEAL DISMISSED.

Hetzbeck, P.J., and McGlynn, J., concur.

41031

BERTHA MONTGOMERY, individually and as President of John R. Tanner Auxiliary Number 16, Department of Illinois Auxiliary United Spanish War Veterans, an unincorporated organization; [illegible] BUTLER, individually and as Senior Vice President, and A[illegible] CHAN, individually and as Junior Vice President of said organization; JESSIE M. HACKLEY; MARTHA HARDING; EFFIE HA[illegible]; ISABELLA A. PETERSON; JESSI[illegible] B. OWENS; PEARL SHELBY; IDELLA HOPKINS; MAYME EDMONDSON, LULA MOSELEY and MARIE BOYD,

Appellants,

v.

MAUD COLES WHITLOCK, individually and as President of National Auxiliary United Spanish War Veterans, an unincorporated organization; JOSEPHINE O'BRIEN, individually and as President of Department of Illinois Auxiliary United Spanish War Veterans, an unincorporated organization; ADA L. DUFFY, individually and as officer and former president of said Department of Illinois; LUELLA ALLEN, individually and as National Senior Vice President; and BETTY BASSET, individually and as Junior Vice President of National Auxiliary United Spanish War Veterans, an unincorporated organization; and MARY A. McGAULEY, individually and as officer and member of said organization,

Appellees.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

806 I.A. 271

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiffs filed their complaint in chancery alleging that they are members of John R. Tanner Auxiliary Number 16, Department of Illinois Auxiliary United Spanish War Veterans, an unincorporated organization, which was issued its charter in 1911 by the National Auxiliary of the United Spanish War Veterans, an unincorporated organization; that its charter had been revoked and declared null and void by the president of the National Organization, and the prayer was that the revocation be declared null and void and the officers of the National and Illinois Auxiliary be "ordered and compelled to rescind, cancel and annul all orders revoking said charter of said John R.

BERTHA MONTGOMERY, individually and as President of John E. Tanner Auxiliary Number 16, Department of Illinois Auxiliary United Spanish War Veterans, an unincorporated organization; [illegible] BUTLER, individually and as Junior Vice President, and [illegible], individually and as Junior Vice President of said organization; [illegible] HANDING; [illegible] SON; [illegible] IDELLA MOTTING; MAYME [illegible] MOBLEY and MARIE [illegible]

v.

MAUD DOLAN MITCHELL, individually [illegible] President of National Auxiliary United Spanish War Veterans, an unincorporated organization; [illegible] CHAPIN, individually and as President of [illegible] Illinois Auxiliary United Spanish War Veterans, an unincorporated organization; [illegible] ADA I. [illegible], individually and as Senior Junior President of said organization of Illinois; [illegible], individually, and as National Senior [illegible]; and [illegible] BETTY [illegible], individually and as [illegible] Vice President of National Auxiliary United Spanish War Veterans, an unincorporated organization; and [illegible] individually and as officers and members of said organization,

Appellees.

MR. JUSTICE [illegible] delivered the opinion of the court:

Plaintiffs filed their petition [illegible] alleging that they are members of John E. Tanner Auxiliary Number 16, Department of Illinois Auxiliary United States War Veterans, an unincorporated organization, which was formed the October in 1921 [illegible] Auxiliary of the United States [illegible] organization; that it has not been dissolved [illegible] void by the president of the National [illegible] that the revocation be declared null and void [illegible] National and Illinois Auxiliary [illegible] cancel and annul all orders [illegible].

Tanner Auxiliary," and to restore the Tanner Auxiliary in good standing with the National Auxiliary. Defendants' motion to strike was allowed and subsequently six amended complaints were successively filed and stricken. Plaintiffs having elected to abide by the last amended complaint, the suit was dismissed at plaintiffs' costs and they appeal.

The record discloses that upon the filing of the original complaint, plaintiffs' solicitor procured an order enjoining defendants from revoking the charter of the John R. Tanner Auxiliary and from disbanding it. The order was entered without notice and without bond. Afterward defendants' motion to strike the complaint for insufficiency was sustained and the temporary injunction dissolved.

From the allegations of the last amended complaint it appears that the National Organization is located in Washington, D. C. and has local auxiliaries located in several of the states. Counsel for plaintiffs says that an "auxiliary may be suspended upon notice of specific written charges and a trial upon the same;" that no expulsion of a member or revocation of a charter of an auxiliary can be effected without specific written charges upon notice and hearing, and a member expelled or the revocation of the charter of an auxiliary, after trial, has 60 days to appeal; that prior to April, 1938, Arvena Franklin became a member of the Tanner Auxiliary of Illinois by means of false statements; that she was legally charged with an offense against the auxiliary and specifically that she "(1) Refused to recognize the authority of the gavel; (2) Was disrespectful to the presiding officer; (3) Used language unbecoming a sister and lady" and that she was duly notified of the charge and the matter heard; that Mrs. Franklin was found guilty but refused to apologize as requested, and the matter was then referred "to the Department President of Illinois Auxiliary United Spanish War Veterans" to be dealt with according to the constitution, rules and regulations of the National Auxiliary; that there was a hearing before the department president, and Mrs. Franklin was found guilty as charged and suspended for 60 days; that she took no appeal from this conviction and was discharged from the Tanner Auxil-

Tanner Auxiliary," and to restore the Tanner Auxiliary in good standing with the National Auxiliary. Defendants' motion to strike was allowed and subsequently six amended complaints were successively filed and stricken. Plaintiffs having elected to rest by the last amended complaint, the suit was dismissed at plaintiffs' costs and they appeal.

The record discloses that upon the filing of the original complaint, plaintiffs' solicitor procured an order enjoining defendants from revoking the charter of the [illegible] Tanner Auxiliary and from disbanding it. The order was entered without notice and without bond. Afterward defendants' motion to strike the complaint for insufficiency was sustained and the temporary injunction dissolved.

From the allegations of the last amended complaint it appears that the National Organization is [illegible] in Washington, D. C. and has local auxiliaries located in several of the states. Counsel for plaintiffs says that an "auxiliary may be suspended upon notice of specific written charges and a trial upon the merits" that no expulsion of a member or revocation of a charter of an auxiliary can be effected without specific written charges and notice and hearing, and a member expelled or the revocation of the charter of an auxiliary, after trial, has 60 days to appeal; that prior to [illegible], [illegible] became a member of the Tanner Auxiliary [illegible] statements; that she was legally charged with [illegible] auxiliary and specifically that she "[illegible] authority of the [illegible]; (2) Used language unbecoming a member [illegible] notified of the charge and the [illegible]; [illegible] found guilty but refused to apologize as required, [illegible] then referred "to the department [illegible] United Spanish War Veterans" to be [illegible] attitude, rules and regulations of the [illegible] was a hearing before the department [illegible] found guilty as charged and suspended for [illegible]; [illegible] appeal from this conviction and was [illegible] Tanner Auxil-

iary; that afterward the local auxiliary was notified that a meeting was to be held for the purpose of considering the revocation of the charter of the Tanner Auxiliary and disbanding it; that at such meeting the proper officers were served with a copy of the injunction order restraining them, as above stated; that no attention was paid to such injunction but the officials in charge of the meeting proceeded to revoke the charter of the Tanner Auxiliary in defiance of the order of court; that section 257 of the Rules and Regulations of the organization provides: "No penalty for a violation of the code of discipline should be inflicted as indicated in Section 260 until the member accused has a fair and impartial trial by court-martial upon written charges and specifications. *** In the event of such summary suspension, the person or persons, charter or charters so suspended shall have the right of appeal to the National Committee on Appeals and Grievances provided such appeal is taken within sixty (60) days from the imposition of the suspension."

Counsel for plaintiffs, in giving plaintiffs' theory of the case says: "that the attempted revocation of the charter and the disbanding of the plaintiff auxiliary by ex parte action without notice or hearing is a nullity; that the defendants having committed the acts complained of after they had abandoned and vacated their offices in the national auxiliary and were acting as officers of an illegal corporation, which was later dissolved because of illegality, and having acted in violation of the constitution, rules and regulations of the organization, nullified their acts and all of such acts were and are null and void and of no force and effect." Counsel further says that no appeal is allowed from the revocation of the charter of an auxiliary, and in his brief makes three points, (1) "The charter granted by a mother fraternal auxiliary to a subordinate local auxiliary constitutes a contract between two auxiliaries, which cannot be revoked or withdrawn in violation of the constitution and by-laws of the order." (2) "The alleged revocation of the charter and disbanding of John R. Tanner Auxiliary No. 16 U.S.W.V. by ex parte action, without

lary; that afterward the local auxiliary was notified that a meeting was to be held for the purpose of considering the revocation of the charter of the Tanner auxiliary and disbanding it; that at such meeting the proper officers were served with a copy of the injunction order restraining them, as above stated; that no attention was paid to such injunction but the officials in charge of the meeting proceeded to revoke the charter of the Tanner auxiliary in defiance of the order of court; that section 457 of the rules and regulations of the organization provides: "No penalty for a violation of the code of discipline should be inflicted on members in good standing until the member accused has a fair and impartial trial by court-martial upon written charges and specifications. In the event of such necessary suspension the person or persons, officer or officers, so suspended shall have the right of appeal to the national committee on appeals and grievances provided such appeal is taken within sixty (60) days from the imposition of the suspension."

Counsel for plaintiff, in giving plaintiff's theory of the case says: "that the attempted revocation of the charter and the disbanding of the plaintiff auxiliary by ex parte action without notice or hearing is a nullity; that the information charging complained of after they had abandoned and vacated their offices in the national auxiliary and were acting as officers of an illegal organization, which was later dissolved because of illegality, and having acted in violation of the constitution, rules and regulations of the organization, nullified their rights and are of good not [illegible] are null and void and of no force and effect." Counsel for defendants say: no appeal is allowed from the revocation of the charter of the auxiliary, and in the brief makes three points, (1) "The action taken by a mother fraternal auxiliary to a subordinate local auxiliary constitutes a contract between the auxiliaries, which cannot be revoked or withdrawn in violation of the constitution [illegible] of the order." (2) "The alleged revocation of the charter and disbanding of John H. Tanner auxiliary no. 10 [illegible] by ex parte action, without

notice and hearing and in violation of the constitution and by-laws of the organization is a nullity." And (3) "The alleged order of the national president not being written and being given by Mary A. McGauley at a time when she was acting as president of an illegal corporation, which was attempting to usurp the powers of the national auxiliary, is a nullity and has no force and effect."

We have not mentioned many of the allegations of the last amended complaint but are clearly of opinion that if the charter of the Tanner Auxiliary was improperly revoked or suspended, persons complaining in such a situation had a right to appeal to the National Committee under section 257, above quoted. No appeal having been taken by plaintiffs, they have not exhausted their remedy and therefore can not invoke the assistance of a court of chancery. People v. The Grand Lodge K.P., 166 Ill. 71.

As an additional ground why the decree dismissing the appeal should be affirmed, counsel for defendants contend that no property rights are involved and therefore a court of chancery has no jurisdiction. This was one of the grounds sustained by the chancellor.

In the Knights of Pythias case, 60 Ill. App. 550, affirmed 166 Ill. 71, the court said: "As to voluntary organizations, it is only in respect to civil or property rights in or growing out of them, that an appeal to the courts of the country can be had. Upon questions of doctrine and policy, the society is the sole and exclusive judge."

This proposition of law seems to be conceded by counsel for both parties. But on the issue of fact counsel disagree, counsel for plaintiffs taking the position that property rights are involved and that this appears from the allegations of the amended complaint, where it is alleged, "issuance of the charter to the plaintiff auxiliary and its continuous use, the payment of dues by the members and the interest of the members in the sick benefit fund together with the legal quota of members of the organization in good standing." That the charter had been issued to the Tanner Auxiliary which exercised its rights and privileges as a member of the National Organization; that

notice and hearing and in violation of the constitution and by-laws of the organization is a nullity." And (2) "The alleged order of the national president not being written and being given by Mary A. McGauley at a time when she was acting as president of an illegal corporation, which was attempting to usurp the powers of the national auxiliary, is a nullity and has no force and effect."

We have not mentioned many of the allegations of the last amended complaint but are clearly of opinion that if the members of the Tanner Auxiliary was improperly revoked or suspended, persons complaining in such a situation had a right to appeal to the National Committee under section 287, above quoted. To appeal having been taken by plaintiffs, they have not exhausted their remedy and therefore can not invoke the assistance of a court of chancery. Knapp v. The Grand Lodge K.P., 188 Ill. 72.

As an additional ground why the decree dismissing the amended should be affirmed, counsel for defendants contend that no property rights are involved and therefore a court of chancery has no jurisdiction. This was one of the grounds contended by the defendants.

In the Knights of Pythias case, 80 Ill. App. 68, affirmed 188 Ill. 72, the court said: "In voluntary associations, it is only in respect to civil or property rights in or [illegible] that an appeal to the courts of the country [illegible] decisions of doctrine and policy, the society [illegible] judge."

This proposition of law seems to be accepted by counsel for both parties. But on the issue of fact counsel [illegible], counsel for plaintiffs taking the position that property rights are involved and that this appears from the allegations of the [illegible] above. It is alleged, "issuance of the charter to the [illegible] auxiliary and its continuous use, the payment of [illegible] interest of the members in the sick benefit fund [illegible] quota of members of the organization [illegible] that the charter had been issued to the Tanner Auxiliary [illegible] rights and privileges as a member of the national organization; that

it built up "a substantial membership of qualified members who pay dues of $.25 per month and who acquired property rights in said charter by virtue of their membership and being in good standing *** became and are entitled to certain pecuniary sick benefits the amount and value of which are determined by the length of time that the parties have been members;" that the national and state organizations are "unincorporated fraternal patriotic organizations composed of relatives of the men, who served in the United States army and navy during the Spanish-American War in 1898."

In Knights of Ku Klux Klan v. First National Bank, 254 Ill. App. 264, a bill was filed for an accounting and injunctive relief. The question of the power of the grand lodge to revoke the charter of a subordinate lodge was involved. Each was a corporation not for pecuniary profit. The court said: "In conclusion, appellants have no property right involved in the cancellation of the charter of Abraham Lincoln Klan No. 3. (Fitcher v. Board of Trade, 121 Ill. 412.) *** The laws and rules of which they complain are of their own choosing, and courts are powerless to aid them."

We think the allegations as to the property rights claimed to be involved are insufficient. There is no allegation as to the amount of money or property, if any, held by the local body, nor is there any allegation showing any one member would be entitled to sick benefits or the amount of such benefits.

We think we ought to say, however, that the contention made by counsel for defendants, that equity cannot give affirmative relief by way of injunction is not the law. The court may award a mandatory injunction in a proper case. Watson v. Smith, 180 Ill. App. 289; Burrall v. Amer. T. & T. Co., 224 Ill. 266; Spalding v. Macomb & S.I.R. Co., 225 Ill. 585; Hunt v. Dain, 181 Ill. 372; Peoples Gas L. & T. Co. v. Slattery, 287 Ill. App. 379.

We are also unable to agree with the contention of counsel for defendants that affidavits which it filed in support of its motion to dismiss can be considered when they purport to set up facts contrary

it built up "a substantial membership of qualified members who pay dues of $.25 per month and who monitor property right in said cemetery by virtue of their membership and being in good standing." "" become and are entitled to certain secondary risk benefits the amount and value of which are determined by the length of time that the parties have been members;" that the national and state organizations are "unincorporated fraternal patriotic organizations composed of relatives of the men, who served in the United States Army and Navy during the Spanish-American war in 1898."

In Estate of Du Bois Eles v. First National Bank, 294 Ill. App. 204, a bill was filed for an accounting and injunctive relief. The question of the power of the probate court to remove the charter of a subordinate lodge was involved. The was a corporation not for pecuniary profit. The court said: "In addition, there are no property rights involved in the cancellation of the charter of Lincoln Elks No. 2. (Elkins v. Court of Appeals, 171 N.Y. 412.) See the laws and rules of which they consists are of their own enacting, and courts are powerless to aid them."

We think the allegations as to the property rights claimed to be involved are insufficient. There is no allegation as to the amount of money or property, if any, held by the local body, nor is there any allegation showing any one member will be entitled to sick benefits or the amount of such benefits.

We think we cannot be sure, however, that the connection made by counsel for defendants, that equity cannot give injunctive relief by way of injunction is not the law. The court may grant a temporary injunction in a proper case. Jackson v. Smith, 189 Ill. App. 1; Burrell v. Amer. C. A. F. Co., 204 Ill. 388; Cushing v. Lewis et al. Co., 208 Ill. 663; Lund v. Cain, 191 Ill. 177; Jewelers Ins. Co. v. Slattery, 287 Ill. App. 278.

We are also unable to agree with the contention of counsel for defendants that affidavits which it filed in support of its motion to dismiss can be considered when they purport to set as facts contrary

to the allegations of the amended complaint. Such affidavits can not be considered unless they fall within the provisions of §48, chap. 110, Ill. Rev. Stats. 1939. Motions to dismiss under the Civil Practice Act are now substituted for demurrers. §45, chap. 110, Ill. Rev. Stats. 1939.

For the reasons stated, the decree of the Circuit Court of Cook county is affirmed.

DECREE AFFIRMED.

Matchett, P.J., and McSurely, J., concur.

to the allegations of the amended complaint. Such affidavits can not be considered unless they fall within the provisions of 146, chap. 110, Ill. Rev. Stats. 1939. Motions to dismiss under the civil practice act are not substituted for demurrers. 146, chap. 110, Ill. Rev. Stats. 1939.

For the reasons stated, the order of the Circuit Court of Cook county is affirmed.

Affirmed.

Matchett, P.J., and Kerner, J., concur.

41343

CLARA A. HOFFMAN, individually and as Administratrix of the Estate of HELENA ENGELKING, Deceased,

Appellee,

v.

ARTHUR ENGELKING, EDWIN ENGELKING, HERMAN ENGELKING and GUSTAV ENGELKING,

Appellants.

INTERLOCUTORY APPEAL FROM SUPERIOR COURT, COOK COUNTY.

306 I.A. 272

MR. JUSTICE McGURE DELIVERED THE OPINION OF THE COURT.

This is an appeal from an interlocutory injunction entered without notice to any of the defendants; it enjoins the executor of the estate of William Engelking from making distribution of any of the assets of the estate and his five sons from accepting any distribution and from selling or disposing of any of the assets.

The only point argued by defendants is the issuance of the injunction without notice.

William Engelking died testate January 5, 1[illegible]; his will was admitted to probate in Cook county, where the estate is still pending, and an executor was appointed. The deceased left him surviving, Helena Engelking, his widow, and five sons, defendants. Engelking was married twice and the sons were the issue by his first marriage. Helena Engelking was his second wife; she also was married twice and Clara Hoffman, the plaintiff, is her only child.

Under the will of Engelking his widow Helena received no share in the personalty and was granted a life interest in certain real estate; she executed a renunciation and elected to take her statutory share of the estate. Helena Engelking died intestate November 20, 1939; her estate was probated in the Probate court of Cook county and letters of administration were issued to Plaintiff, the sole heir. As a result of Helena's renunciation she became entitled to one-third of all of the assets of the estate of William Engelking and upon her death her interest was vested in Clara Hoffman as admin-

41543

CLARA A. HOFFMAN, individually and as Administratrix of the Estate of HELENA ENGELKING, deceased,

Appellee,

v.

ARTHUR ENGELKING, ROSIN ENGELKING, HERMAN ENGELKING and [illegible] ENGELKING,

Appellants.

MR. JUSTICE [illegible] delivered the opinion of the court:

This is an appeal from an interlocutory injunction entered without notice to any [illegible] it enjoins the sale of the estate of [illegible] assets of the estate and the five [illegible] and distribution and from selling or disposing of any of the assets.

The only point raised by defendants is the [illegible] injunction without notice.

Illinois [illegible] Chancery [illegible] admitted to probate in [illegible] County, where [illegible] and an executor was appointed. [illegible] Helena Engelking, his wife, and [illegible] married twice and the [illegible] Engelking was [illegible] Hoffman, the plaintiff, [illegible] only child.

Under the will of Engelking [illegible] share in the residuary [illegible] real estate; she [illegible] statutory share of the estate. [illegible] November 20, 1931, her estate [illegible] Cook County and letters of administration [illegible] sole heir. As a result of Helena's [illegible] to one-third of all of the assets [illegible] and upon her death her interest [illegible]

istratrix of her estate and as her sole heir.

The complaint, among other things, asks for an accounting of the personal assets of the estate of William Engelking and for a partition or sale of the real estate.

Section 3, chap. 69, Ill. Rev. Stats. 1939, provides that no injunction shall be granted without previous notice having been given to the defendants to be affected, "unless it shall appear, from the complaint or affidavit accompanying the same, that the rights of the plaintiff will be unduly prejudiced if the injunction is not issued immediately or without such notice." Paragraph 13 of the complaint is the only one touching the failure to give notice in compliance with the statute. It recites that an order has been entered in the Probate court in the William Engelking estate requiring the executor to file his final account and make distribution of the estate under the provisions of the will; that this order "is in derogation of the interests of the plaintiff as administratrix of the estate of and sole heir of Helena Engelking. The order deprives the estate of Helena Engelking and Clara Hoffman, her sole heir, of the share of one-third of the real and personal assets of the estate of William Engelking, as provided by statute by virtue of the renunciation and election of Helena Engelking, and plaintiff alleges that if distribution is made, irreparable injury will result to this plaintiff."

In many cases it has been held that no presumptions are to be indulged in favor of an injunction without notice, but the parties seeking an injunction must, on facts stated, bring themselves within the exception of the statute. Failing so to do, an injunction granted without notice will be held to be improvident and dissolved. Brin v. Craig, 135 Ill. App. 301; Thulin v. National Ice & Fuel Corp., 297 Ill. App. 155; Rieder v. White, 160 Ill. App. 576; Sprague v. Monarch Book Co. 105 Ill. App. 530, and many other cases. The allegations of the present complaint wholly fail in this respect. At most they only assert occurrences which might result in damages to the plaintiff. There are no allegations of fraud, accident or mistake in the Probate

intestate of her estate and as her sole heir.

The complaint, among other things, sues for an accounting of the personal assets of the estate of Hilliar Spaulding and for a partition or sale of the real estate.

Section 3, chap. 83, Ill. Rev. Stat. 1969, provides that no injunction shall be granted without notice, notice having been given to the defendants to be [illegible], unless it shall appear from the complaint or affidavit accompanying the same, that the rights of the plaintiff will be unduly prejudiced if the injunction is not issued immediately or without such notice. [illegible] of the complaint is the only one touching the failure to give notice in compliance with the statute. It is obvious that no order has been entered in the probate court in the Hilliar Spaulding estate granting the executor of his final account and case [illegible] of the estate under the provisions of the will; that no order has been entered in administration of the interests of the plaintiff as similar heir of the estate of and sole heir of Hilliar Spaulding. The order deprives the estate of Hilliar Spaulding and other [illegible] of the benefit of the [illegible] of one-half of the real and personal assets of the estate of Hilliar Spaulding, as provided by statute by virtue of the [illegible] and election of Hilliar Spaulding, and [illegible] that if distributing is done, irreparable injury will occur to this plaintiff."

In many [illegible] be regarded in [illegible] injunction [illegible] seeking an injunction [illegible] within the discretion of the statute. [illegible] without notice will be [illegible] Ill. App. 1969; [illegible] Co., 100 Ill. App. 1969; [illegible] Co., 100 Ill. App. 1969. There are no allegations of fraud. [illegible] present complaint should [illegible] assert circumstances which [illegible] there are no allegations of fraud, [illegible] the probate

court proceedings. There is no allegation that the order of distribution was entered without notice to her or without her appearance. Under these circumstances the interlocutory injunction must be reversed.

The want of notice is the only point presented by the appealing defendants. The entire complaint, however, fails to show any justification for interference with the administration of the estate by the Probate court, which has ample power to control the executor and the administration of the estate. (See pars. 289-308, chap. 3, Ill. Rev. Stats. 1939.)

The interlocutory injunctional order is reversed.

REVERSED.

O'Connor, P.J., and Matchett, J., concur.

court proceedings. There is no allegation that the order of distribution was entered without notice to her or without her appearance. Under these circumstances the interlocutory injunction must be reversed.

The want of notice is the only point presented by the appealing defendants. The entire complaint, however, fails to show any justification for interference with the administration of the estate by the probate court, which has ample power to control the executor and the administration of the estate. (See Jones, 28U-508, chap. 5, III, Rev. Stats. 1929.)

The interlocutory injunctional order is reversed.

Reversed.

O'Connor, P.J., and Matchett, J., concur.

41039

BELLA ZEMEL,
Appellee,

v.

METROPOLITAN LIFE INSURANCE COMPANY, a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

306 I.A. 272

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover the face value of a life insurance policy issued to her deceased husband, Abe Zemel. Trial by jury resulted in a verdict and judgment in her favor for $1,000, from which defendant has taken an appeal.

The policy issued March 6, 1935. The insured died August 23, 1936, while the policy was still in full force and effect. When Zemel applied for insurance Dr. Samuel Young examined the insured and also elicited from him answers to certain questions relating to applicant's health. These answers were noted on the application, which was later signed by Zemel. The principal controversy arises over the following questions propounded, and answers made by the applicant: "Q. Have you ever been told there was albumin, sugar, or casts in your urine? A. No. Q. Have you ever taken Insulin treatment? If Yes, state dates and for how long. A. No."

It is urged that plaintiff is bound by the terms of the policy sued upon, with the application thereto attached and expressly made a part of such policy, and that the answers to the foregoing questions, being material to the risk, their falsity voids the contract and bars any recovery thereon. To support this defense defendant introduced certain evidence tending to show that applicant had died of diabetes; that during the year 1934, which was prior to the issuance of the policy, he had been examined and had received treatment for diabetes at the Michael Reese hospital in Chicago,

41039

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| BELLA ZEMEL, Appellee, v. METROPOLITAN LIFE INSURANCE COMPANY, a corporation, Appellant. | APPEAL FROM MUNICIPAL COURT OF CHICAGO. |

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover the face value of a life insurance policy issued to her deceased husband, Samuel. Trial by jury resulted in a verdict and judgment in her favor for $1,000, from which defendant has taken an appeal.

The policy issued March 9, 1935. The insured died August 23, 1936, while the policy was still in full force and effect. Mrs. Zemel applied for insurance on Mr. Zemel found examined the insured and also obtained from him answers to certain questions relating to applicant's health. These answers were noted on the application, which was later signed by Zemel. The principal controversy arises over the following questions propounded, and answers made by the applicant: "Q. Have you ever been told there was sugar, albumin, or casts in your urine? A. No. Q. Have you ever taken insulin treatment? If yes, state dates and for how long. A. No."

It is urged that plaintiff is bound by the terms of the policy issued upon, with the application thereto attached and expressly made a part of such policy, and that the answers to the foregoing questions, being material to the risk, make it a fraudulent contract and bars any recovery thereon. To support this defense defendant introduced certain evidence tending to show that Zemel had died of diabetes, that during the five years, more or less, prior to the issuance of the policy, he had been examined and had received treatment for diabetes at the Michael Reese Hospital in Chicago,

and that injections of insulin had been administered to him for a considerable time prior to the issuance of the policy. However, the evidence adduced by defendant was extremely vague, in that the interne who had attended Zemel at the Michael Reese hospital was unable to identify or connect the patient with the treatments administered, and therefore the trial court, after careful consideration, struck the evidence which constituted the principal defense from the record, on plaintiff's motion.

Upon oral argument it developed that nowhere in defendant's brief and argument does it complain of the trial judge's ruling in excluding the evidence introduced as tending to prove that Zemel had been treated for diabetes, which constituted the principal defense, and under these circumstances, the correctness of the court's ruling cannot be questioned. Plaintiff had made a prima facie case, and the only substantial defense which the insurance company might have had was eliminated from the record by the court's ruling. It is so elementary as to require no citation of authority that where on appeal a party does not raise or argue errors alleged to have been committed by the court, the same will be considered as waived. Evidence, tending to support the affirmative defense which was alleged in the pleadings was excluded from the record by the trial judge, and no point having been made on appeal as to the propriety of the court's ruling, we are impelled to hold that the judgment of the Municipal court should be affirmed. It is so ordered.

JUDGMENT AFFIRMED.

Scanlan and Sullivan, JJ., concur.

and that injections of insulin had been administered to him for a considerable time prior to the issuance of the policy. However, the evidence adduced by defendant was extremely vague, in that the interne who had attended Zemel at the Mt.Sinai Hospital was unable to identify or connect the patient with the treatments administered, and therefore the trial court, after careful consideration, struck the evidence which contained the principal defense from the record, on plaintiff's motion.

Upon oral argument it developed that nowhere in defendant's brief and argument does it complain of the trial judge's ruling in excluding the evidence introduced as tending to prove that Zemel had been treated for diabetes, which constituted the principal defense, and under these circumstances, the correctness of the court's ruling cannot be questioned. Plaintiff had made a prima facie case, and the only substantial defense which the insurance company might have had was eliminated from the record by the court's ruling. It is so elementary as to require no citation of authority that where on appeal a party does not raise or argue errors alleged to have been committed by the court, the same will be considered as waived. Evidence, tending to support the affirmative defense which was alleged in the pleadings was excluded from the record by the trial judge, and no point having been made on appeal as to the propriety of the court's ruling, we are impelled to hold that the judgment of the municipal court should be affirmed. It is so ordered.

JUDGMENT AFFIRMED.

Sullivan and Sullivan, JJ., concur.

41050

HAROLD A. FEIN,
Appellee,

v.

TAYLOR WASHING MACHINE CO., a corporation,
Appellant.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

306 I.A. 273

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against the Taylor Washing Machine Co., Ellis R. Taylor and Walter A. Delaney, to recover the sum of $4,562.92 for attorney's fees. Summary judgment was entered against the Taylor Washing Machine Co., and the two individual defendants were dismissed from the case on plaintiff's motion. Subsequently the corporation's motion to vacate the summary judgment was denied, and an appeal was taken by the corporation from the summary judgment and the order denying its petition to vacate the summary judgment.

Plaintiff had been retained by the Taylor Washing Machine Co. in a matter pending before the Federal Trade Commission. His complaint alleges that under an oral agreement entered into September 11, 1936, the corporation agreed to pay him a retainer of $1,000 and the sum of $200 a day for legal services rendered out of Chicago and $100 a day for services rendered in the city, as well as all traveling expenses. It is alleged that as a result of services rendered from September 11, 1936, to and including February 25, 1938, after allowing the defendants all credits, there remained an indebtedness of $4,562.92.

Defendants filed their appearance and a demand for a trial by jury. Their verified answer, signed by Walter A. Delaney, as secretary of the corporation and its duly authorized agent, denied that any services were rendered in behalf of the individual defendants. As to the corporation, it denied the agreement to pay $200 a

HAROLD A. PETRY,
Appellee,

v.

TAYLOR MACHINE WORKS
CO., a corporation,
Appellant.

Appeal from Circuit Court,
[illegible].

MR. PRESIDING JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against the defunct working machine Co., Willis A. Taylor and [illegible] to recover the sum of $4,502.92 for [illegible] judgment was entered against the [illegible] defendants [illegible] motion. Subsequently [illegible] vacated the [illegible] judgment was denied, [illegible] the corporation from the [illegible] judgment [illegible] vacate the [illegible] judgment.

Plaintiff has been [illegible] by the Taylor Working Machine Co. in a matter [illegible] complaint alleges that [illegible] Jan. 1, 1922, the corporation [illegible] of $4,000 and [illegible] sum of $500 [illegible] and one of [illegible] and $100 a day for [illegible] traveling expenses. [illegible] of services [illegible] after allowing the [illegible] balance of $4,502.92.

[illegible] by jury. [illegible] secretary of the corporation [illegible] that his services [illegible] in [illegible] [illegible] to the corporation, [illegible]

a day for services rendered away from Chicago and $100 a day for services rendered in the city, and averred that Taylor Washing Machine Co. did agree to pay the plaintiff the sum of $1,000 in full for services to be rendered in behalf of the corporation in the matter then pending before the Federal Trade Commission, and that the sum of $1,000 was thereafter paid to plaintiff in accordance with the agreement. The answer further avers that on October 1, 1936, the corporation paid plaintiff the sum of $147.15 for traveling expenses, in accordance with a statement rendered, and that under an agreement between plaintiff and the corporation, made April 1, 1937, plaintiff agreed to accept the sum of $550 in full for services rendered and to be rendered in a suit for damages which was to be instituted against the Chicago Better Business Bureau, which sum was thereafter paid by the corporation to plaintiff.

Plaintiff's replication denies that he agreed to accept $1,000 in full for services rendered before the Federal Trade Commission, and also denies the alleged agreement of April 1, 1937, to accept the sum of $550 for services rendered and to be rendered in connection with the damage suit against Chicago Better Business Bureau.

June 13, 1938, plaintiff served counsel for defendants with notice and affidavit to place the cause upon the jury trial calendar, and the case was later set for trial on that call. Before it was reached, however, plaintiff filed a motion for summary judgment, supported by his own affidavit and that of Gloryette Kaplan, a stenographer, and Walter A. Delaney, the former secretary of the Taylor Washing Machine Company, who had made and signed the affidavit of defense filed by the defendants. Plaintiff's affidavit contains a summarized statement of the legal services performed by him; the affidavit of Miss Kaplan bears the dates upon which statements were mailed to defendant corporation; and Delaney's affidavit, which is directed to plaintiff, contains the following salient allegations:

"The undersigned, Walter A. Delaney, voluntarily makes

a day for services rendered away from Chicago and $100 a day for services rendered in the city, and averred that Taylor Washing Machine Co. did agree to pay the plaintiff the sum of $1,000 in full for services to be rendered in behalf of the corporation in the matter then pending before the Federal Trade Commission, and that the sum of $1,000 was thereafter paid to plaintiff in accordance with the agreement. The answer further avers that on October 1, 1926, the corporation paid plaintiff the sum of $47.15 for traveling expenses, in accordance with a statement rendered, and that under an agreement between plaintiff and the corporation, made April 1, 1927, plaintiff agreed to accept the sum of $250 in full for services rendered and to be rendered in a suit for damages which was to be instituted against the Chicago Better Business Bureau, which sum was thereafter paid by the corporation to plaintiff.

Plaintiff's replication denies that he agreed to accept $1,000 in full for services rendered before the Federal Trade Commission, and also denies the alleged agreement of April 1, 1927, to accept the sum of $250 for services rendered and to be rendered in connection with the damage suit against Chicago Better Business Bureau.

June 1, 1929, plaintiff served counsel for defendants with notice and affidavit to place the cause upon the jury trial calendar, and the case was later set for trial on that call. Before it was reached, however, plaintiff filed a motion for summary judgment, supported by his own affidavit and that of Forrette Sylvester, a stenographer, and Walter A. Delaney, the former secretary of the Taylor Washing Machine Company, who had made and signed the affidavit of defense filed by the defendants. Plaintiff's affidavit contains a summarized statement of the legal services performed by him; the affidavit of Miss Kaplan bears the notes from which statements were mailed to defendant corporation; and Delaney's affidavit, which is directed to plaintiff, contains the following salient allegations:

"The undersigned, Walter A. Delaney, voluntarily makes

this statement to you as the representation of the facts involved in the suit pending between Harold A. Fein v. Taylor Washing Machine Company, Ellis R. Taylor and Walter A. Delaney in Circuit Court of Cook County case No. 38 C 6746. This statement is made because it is my desire to adhere to the facts and because of the pleadings which were filed in that case at the time I was in the employ of the Taylor Washing Machine Company as Secretary and Credit Manager. Because of my employment I was directed to sign an affidavit of defense by Mr. Taylor without regard to the actual facts involved. ***

"This statement is made by me voluntarily for the purpose of fully disclosing all of the facts as I know them to be, without any promise having been made to me by Fein, or anyone in his behalf, and solely for the purpose of disclosing the truth; that the answer filed in the Circuit Court proceedings on behalf of the defendants was dictated by Michael J. Sullivan, attorney for the defendant therein, from information furnished said Michael J. Sullivan by Ellis R. Taylor and this affiant; that in the preparation of said answer neither Ellis R. Taylor or this affiant fully disclosed to Michael J. Sullivan all of the facts as herein stated."

Delaney's affidavit, which is quite lengthy, admits the claim of plaintiff against defendant corporation.

Subsequently, Taylor Washing Machine Company and Ellis R. Taylor filed the counteraffidavits of Michael J. Sullivan and Ellis R. Taylor in defense to the motion for summary judgment. Sullivan's affidavit avers that he was attorney for the defendants and retained by them to defend the cause of action instituted by plaintiff; that in accordance with the statements made to him by Delaney he prepared and filed the answer of defendants; that the allegations contained in the answer are a true statement of the facts as given him by defendant Delaney, and that he would testify to such facts if called as a witness. The affidavit of Ellis R. Taylor avers that he was president of the corporation, that he read the affidavit of Walter A. Delaney, filed in support of plaintiff's motion for a summary judgment, and that Delaney's affidavit was "entirely inconsistent with the sworn answer to the complaint filed herein, and that the allegations contained in said answer of this affiant and the Taylor Washing Machine Company, a corporation, to the complaint of said plaintiff, and signed by the said Walter A. Delaney, as secretary of the corporation and individually, is a true statement of the facts in connection with the employment of said plaintiff;" and he averred that "he makes the facts contained in the sworn answer filed by defendants in said cause a part of this affidavit,

this statement to you as the representation of the facts involved in the suit pending between Harold A. Fain v. Taylor Washing Machine Company, Hilis R. Taylor and Walter A. Delaney in Circuit Court of Cook County case No. 38 C 6744. This statement is made because it is my desire to adhere to the facts and because of the pleadings which were filed in that case at the time I was in the employ of the Taylor Washing Machine Company as Secretary and Credit Manager. Because of my employment I was directed to make an affidavit of defense by Mr. Taylor without regard to the actual facts involved. ***

"This statement is made by me with full knowledge of the purpose of fully disclosing all of the facts as I know them to be, without any promise having been made to me by Taylor, or anyone in his behalf, and solely for the purpose of disclosing the truth; that the answer filed in the Circuit Court proceeding on behalf of the defendants Hilis Taylor by Richard A. Sullivan, Attorney for the defendant therein, from information furnished to Richard A. Sullivan by Hilis R. Taylor and Walter A. Delaney, or in the presence of said answer neither Hilis R. Taylor or this affiant fully disclosed to Michael T. Sullivan all of the facts in Fain's suit.

Delaney's affidavit, which incorporate herein, makes the claim of plaintiff against defendant corporation.

Subsequently, Taylor Washing Machine Company and Hilis R. Taylor filed the counterclaim with Michael T. Sullivan and Hilis R. Taylor in defense to the motion for summary judgment. Sullivan's affidavit avers that he was attorney for the defendants and retained by them to defend the claims of Fain as set forth in pleadings; that in accordance with the instructions given to him by Hilis R. Taylor and filed the answer of defendants; that the allegations contained in the answer are a true statement of the facts as given him by defendant Delaney, and that he would be willing to testify in open court as a witness. The affidavit of Hilis R. Taylor [illegible] corporation, [illegible] Delaney, [illegible] support of Sullivan's motion for summary judgment, the [illegible] Delaney's affidavit was a "carefully interpreted with the [illegible] complaint filed herein, and that the allegations contained [illegible] answer of this affiant and the Taylor Washing [illegible] poration, to the complaint of said plaintiff [illegible] Walter A. Delaney, [illegible] of the corporation [illegible] a true statement of the facts in connection with [illegible] plaintiff;" and he averred that "he makes the same [illegible] sworn answer filed by defendants in [illegible] of said affiant,

and that this affiant, if sworn as a witness, can testify competently to such facts as his personal knowledge." He further states that on the 19th of September, 1938, Delaney gave his deposition, under oath, upon plaintiff's motion, and that said deposition fully supports the answer filed by affiant and the other defendants.

After Ellis R. Taylor and Walter A. Delaney were dismissed as parties defendant, the corporation, on July 7, 1939, filed its petition to vacate the summary judgment, in which it set forth part of a deposition of Walter A. Delaney, taken September 19, 1938, wherein he testified under oath that plaintiff never made the statement that he would charge $200 a day away from Chicago and $100 a day for time spent while in Chicago. The petition further alleged that the court was without jurisdiction to consider the truth or falsity of the corporation's answer, and was limited merely to a consideration as to whether the answer set up a good defense. The affidavit also averred that by the entry of the summary judgment the corporation was deprived of the right of trial by a jury.

The sole question presented is whether under the pleadings and affidavits filed the court was justified in entering summary judgment against the corporation. Plaintiff takes the position that under section 57 of the Civil Practice act (Ill. Rev. Stats. 1939, chap. 110, par. 181) and Rule 15 of the Supreme court supplementing the act, summary judgment, on motion supported by affidavits in accordance with the act, may be properly entered unless defendant, by affidavit, discloses facts constituting a meritorious defense. He argues that the affidavits of Kaplan and Delaney, in support of the judgment, fully complied with the statute and rule, but that the affidavits of Sullivan and Taylor in opposition thereto do not in any respect meet the requirements of the statute or Rule 15 (2). It is urged that Sullivan's affidavit merely avers that the original answer to the complaint was prepared by him from information furnished by Delaney, and that the affidavit of Taylor merely states that the original answer, subscribed by Delaney as secretary of the corporation, is a true statement of the facts; and that neither Sullivan nor Taylor in their affidavits denied any of the

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such facts as his personal knowledge." The plaintiff [illegible] that on the
th of September, 1933, Delaney gave his deposition, under oath, upon
aintiff's motion, [illegible] deposition fully supports the answer
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allegations of fact stated in the affidavits of Kaplan or Delaney, nor set up any new matter by way of defense. Plaintiff relies on the requirement of the statute and Rule 15 which requires a defendant to join issue on the motion for summary judgment, and that failure so to do justified the court, upon consideration of plaintiff's three affidavits in support of the motion and those in opposition thereto, in entering the summary judgment, since defendant's affidavits raise no issue of fact to justify the submission of the cause to a jury. The gravamen of plaintiff's position is that, although under the original affidavit of defense defendant would have been entitled to a trial, the corporation's failure to again set forth the defense in its affidavitsin opposition to the summary judgment left it without an issue of fact to justify submitting the case to a jury.

We think the affidavits of Michael J. Sullivan and Ellis R. Taylor sufficiently comply with the statutory provisions and rule. Sullivan's affidavit alleged that he had prepared the answer in accordance with statements made to him by Delaney; that the allegations contained in the answer were a true statement of the facts as given to him by Delaney, and that he was prepared to so testify. Ellis R. Taylor's affidavit alleged that the original affidavit of defense was a true statement of the facts in connection with plaintiff's employment, that if sworn as a witness he was prepared to so testify, of his personal knowledge, and he also alleged that Delaney had in September, 1938, under oath, made a deposition fully supporting the answer filed by the corporation and the other defendants.

The provisions of the practice act for summary judgment were obviously enacted to enable a plaintiff to obtain judgment where no legal defense is interposed. In the case at bar the affidavit of merits discloses a valid dispute between plaintiff and the corporation as to plaintiff's compensation. Plaintiff concedes that if Delaney had not filed the second affidavit the answer would have entitled the corporation to a trial, and, in fact, a motion was made by plaintiff, before he applied for summary judgment, to set the cause for trial. The affidavits in opposition to the motion for summary judgment reaffirmed the averments of the answer, and characterized them as "a true statement of the facts

llegations of fact [illegible] affidavits of [illegible] or [illegible], nor
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opposition to [illegible] for summary judgment [illegible] the [illegible] months
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in connection with the employment of said plaintiff." The pleadings made up an issue of fact which could only fairly be determined by a hearing. In view of Delaney's contradictory affidavits the court would have been fully justified in striking the affidavit of defense and allowing defendant to file another affidavit of merits. However, we do not think that the entry of a summary judgment was proper under the circumstances.

The judgment of the Circuit court entering summary judgment and the order denying the petition to vacate the summary judgment are reversed, and the cause is remanded with directions to proceed to a trial of the cause upon its merits.

JUDGMENT AND ORDER REVERSED AND
CAUSE REMANDED WITH DIRECTIONS.

Scanlan and Sullivan, JJ., concur.

in connection with the employment of said plaintiff." The pleadings made up an issue of fact which could only fairly be determined by a hearing. In view of plaintiff's contradictory affidavits the court would have been fully justified in striking the affidavit of defense and allowing defendant to file another affidavit of merits. However, we do not think that the entry of a summary judgment was proper under the circumstances.

The judgment of the circuit court entering summary judgment and the order denying the petition to vacate the summary judgment are reversed, and the cause is remanded with directions to proceed to a trial of the cause upon its merits.

JUDGMENT AND ORDER REVERSED AND
CAUSE REMANDED WITH DIRECTIONS.

Gaelan and Gulliver, JJ., concur.

41153

CATHERINE CAPORALE,
Appellee,

v.

THE SOVEREIGN CAMP OF THE WOODMEN OF THE WORLD, a corporation, now known as WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

306 I.A. 273

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover from the defendant, a fraternal benefit society, the aggregate sum of $1,500 represented by two benefit certificates issued on the life of her son, Louis M. Caporale, wherein she was designated as beneficiary. Trial by the court without a jury resulted in a judgment in favor of plaintiff for $1,500, and $150 interest and costs, from which defendant has taken this appeal.

The only defense interposed to the action was that the insured had stated in his application that the cause of his father's death was pneumonia, whereas defendant claims that he died from pulmonary hemorrhage, resulting from tuberculosis. There is substantially no dispute as to the facts. Plaintiff and another son testified that in September, 1933, Ralph Caporale, father of insured, was engaged in the candy and grocery business in Chicago; that he was a husky looking man, and weighed upward of 175 pounds, had a good appetite, slept well and never complained of any trouble; that on September 25th of that year he went to Sheboygan, Wisconsin, to visit his brother and died there October 24th.

The application for the two beneficial certificates was made in March, 1936, about two and a half years after Ralph Caporale's death. The applicant was then about 20 years of age and lived in Chicago. The application for insurance was taken by one Dr. Ernest P. Olivieri, and prepared in his own handwriting. When the medical examiner inquired of Louis Caporale as to the cause of his father's

CATHERINE CAROLINE,
Appellee,

v.

THE SOVEREIGN CAMP OF THE WOODMEN OF THE WORLD, a corporation, nor known as WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE FARMER DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover from the defendant, a fraternal beneficiary society, the aggregate sum of $1,500 represented by two benefit certificates issued on the life of her son, Louis A. Caporale, wherein she was designated as beneficiary. Tried by the court without a jury, she recovered a judgment in favor of plaintiff for $1,500 and interest in court, from which defendant has taken this appeal.

The [illegible] insured had stated [illegible] death was produced [illegible] pulmonary [illegible] stantially [illegible] testified [illegible] was engaged in [illegible] was a hearty [illegible] good appetite. [illegible] on September [illegible] visit his [illegible]

The [illegible] made in [illegible] death. The [illegible] Chicago. The [illegible] B. Olivieri, and [illegible] examiner inquiring [illegible] work is to the cause of his father's

death, the applicant answered, "I think it is pneumonia," but Dr. Olivieri wrote on the application only the word "pneumonia."

While in Sheboygan, Ralph Caporale was attended in his last illness by Dr. C. N. Sonnenburg, a physician and surgeon in Sheboygan, who, testifying by deposition on behalf of defendant, stated that through the history of the case and from his examination he found that Ralph Caporale had suffered and died from "flu" and tuberculosis, pulmonary hemorrhage being the immediate cause of death and active tuberculosis and influenza contributing causes, and he prepared the answers on the original death certificate and signed and filed the same with the Department of Health at Sheboygan.

Dr. Olivieri, who also testified on behalf of defendant, stated that pulmonary hemorrhage may be caused by pulmonary tuberculosis, injury to the chest, influenza, heart disease, or by a cold, asthma, bronchitis, and the bursting of a blood vessel. He also testified that pulmonary hemorrhage has to be confirmed by X-ray or sputum analysis, and even then it is difficult to definitely ascertain the cause. In this case neither X-ray nor sputum analysis was taken. It further appears from the evidence that Ralph Caporale had worked at his occupation until the day of his death, and was attended by Dr. Sonnenburg only on October 24th, the day on which he died.

The application for insurance was signed by the applicant, who certified that all the statements therein were true and agreed that any untrue statements made by him would make the certificates void. When the certificates of insurance were issued April 28, 1936, they contained a provision that they had been issued "in consideration of the warranties and agreements in the application." The applicant died July 25, 1937. When claim was made for the face value of the two certificates, defendant paid to the clerk of the Municipal court $49.23, as its tender of all moneys received on account of the certificates, but refused to pay the face value of $1,500.

The gravamen of the defense interposed is that the statement

death, the [illegible] is assumed, [illegible]
Dr. Olivieri [illegible] "[illegible]."

[illegible] in his
last illness [illegible] a physician in Oregon in
Shebogan, who [illegible] on behalf of [illegible],
stated that [illegible] the [illegible] examination
he found that [illegible] "[illegible]" and
tuberculosis, [illegible] cause of
death and active [illegible] contributing causes,
and he prepared [illegible] official death certificate, was
signed and filed [illegible].

Dr. [illegible] stated that [illegible] tuber-
culosis, i [illegible] asthma, [illegible] testified [illegible]
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the [illegible]
died only [illegible]
two certificates [illegible]
49, as it [illegible]
certificates, [illegible]

as to the cause of his father's death by the applicant constituted a warranty, and that it was such a false representation as to preclude recovery.

Dr. Sonnenburg's death certificate shows that the principal cause of the death of applicant's father was pulmonary hemorrhage, and Dr. Olivieri testified that pulmonary hemorrhage may be caused by any one of several ailments, including pneumonia. Both pulmonary hemorrhage and pneumonia are diseases of the lungs, and therefore when, answering as to the cause of his father's death, the applicant said, "I think it is pneumonia," his answer indicated either some doubt in his own mind or a lack of knowledge as to the cause of his father's death. The answer, "I think it was pneumonia," was certainly not a false representation; it was at most an opinion, of a layman, as to which the applicant himself had some doubt. Furthermore, according to the evidence presented upon the hearing, the answer was substantially true. It was never definitely ascertained that his father died from hemorrhage due to tuberculosis. No X-rays were taken, nor was a sputum analysis made, and without these measures the exact cause of the hemorrhage could not be definitely ascertained. Physicians testified that the exact cause of the hemorrhage could not even be definitely ascertained by X-rays or sputum analysis.

The law is well settled in this state and other jurisdictions that an answer in an application for insurance will not be regarded as a warranty unless it was so intended by the parties. (Crosse v. Knights of Honor, 254 Ill. 80; Janelunas v. Chicago Fraternal Ass'n, 286 Ill. App. 219; Erikson v. Merchants Reserve Life Ins. Co., 209 Ill. App. 342; Minnesota Mutual Life Ins. Co. v. Link, 230 Ill. 273.)

In Crosse v. Knights of Honor, 254 Ill. 80, at p. 84, the court called attention to the fact that warranties are not favored in law, and that "if there is anything to be found in the application or certificate tending to show that the answers and statements were not intended by the parties to be regarded as warranties, such answers or statements as are not material to the risk and were honestly made in the belief that they were true will not present any obstacle to

as to the cause of his [illegible] with by the applicant constituted a warranty, and that it [illegible] false representation as to previous recovery.

Dr. Bonnemort's [illegible] certificate shows that the principal cause of the death of [illegible] Albert F. Ther was pulmonary hemorrhage, and Dr. Olivert testified that pulmonary hemorrhage may be caused by any one of several ailments, including [illegible]. Both pulmonary hemorrhage and pneumonia are diseases of the lungs, and therefore when, answering as to the cause of his father's death, [illegible] said, "I think it is pneumonia," his answer indicated that either a [illegible], in his own mind or a lack of knowledge as to the cause of his father's death. The answer, "I think it was pneumonia," [illegible] representation; it was at most an opinion, [illegible] which the applicant himself had some doubt. Furthermore, according to the evidence presented upon the hearing, the answer is substantially true. It is never definitely ascertained that Mr. Ther died from hemorrhage or tuberculosis. No X-rays were taken, nor [illegible], and without these measures the exact cause of the hemorrhage could not be definitely ascertained. Physicians testified that the exact cause of the hemorrhage could not even be [illegible] by x-rays or sputum analysis.

The law is well [illegible] and other jurisdictions that an answer in an application [illegible] warranty will not be regarded as a warranty unless it was so intended by the parties. (Grosse v. Knights of Honor, 294 Ill. [illegible] v. [illegible], 20 Ill. App. 219; Erickson v. [illegible] Life Ins. Co., 209 Ill. [illegible]; Minnesota Mutual Life [illegible] v. Dinn, 190 Ill. 423.

In Grosse [illegible] v. Knights of Honor, 294 Ill. [illegible], the court called attention [illegible] fact that [illegible] law, and that "if [illegible] certificate [illegible] intended by the parties [illegible] regarded [illegible] statements are not [illegible] to the risk [illegible] the belief that they will [illegible]

recovery."

In Minnesota Mutual Life Ins. Co. v. Link, 230 Ill. 273, the court held: "Whether the alleged false answers are warranties or mere representations is a question to be determined from a construction of the contract, which should be in accordance with the expressed intention of the parties," and said that it was "not reasonable to suppose that Miller took this policy with the distinct understanding that it would be void and that all premiums paid by him on it were a mere gratuity conferred upon the company, and yet if the absolute truth of all the answers to more than three-score questions was warranted there is scarcely a probability that any liability could ever accrue on such policy."

It is inconceivable in the case at bar that the insured intended to warrant his answer to be literally true. His father died in another town almost thirty months before the application was signed and the applicant likely did not have any positive knowledge or information on the subject, and therefore used the qualifying words, "I think," and his doubt as to the cause of his father's death is fortified by the testimony of Dr. Olivieri and the statement in the death certificate by Dr. Sonnenburg, both of whom evidently entertained some doubt as to the cause of the hemorrhage.

Various other points are raised and argued by the respective parties, but we think that under the undisputed evidence plaintiff was entitled to recover upon the two certificates and that the Municipal court properly entered judgment for the face value thereof together with interests and costs. Judgment of the Municipal court is affirmed.

JUDGMENT AFFIRMED.

Scanlan and Sullivan, JJ., concur.

recovery."

In Kimberlin Mutual Life Ins. Co. v. Lunn, 30 Ill. 273, the court held: "Whether the alleged false answers are warranties or mere representations is a question to be determined from a construction of the contract, which should be in accordance with the expressed intention of the parties," and said that it was "not reasonable to suppose that Miller took this policy with the distinct understanding that it would be void and that all premiums paid by him on it were a more gratuity conferred upon the company, and yet if the absolute truth of all the answers to more than three-score questions was warranted there is scarcely a probability that any liability could ever accrue on such policy."

It is inconceivable in the case at bar that the insured intended to warrant his answer to be literally true. His father died in another town almost thirty months before the application was signed and the applicant likely did not have any positive knowledge or information on the subject, and therefore used the qualifying words, "I think," and his doubt as to the cause of his father's death is verified by the testimony of Dr. Halvert and the statement in the death certificate by Dr. Sonnenburg, both of whom evidently entertained some doubt as to the cause of the insured's death.

Various other points are raised by the respective parties, but we think that the conflicting evidence, similarly as in the case of Kimberlin, was entitled to receive the effect of the verdict and that the municipal court properly entered judgment for the face value thereof together with interest [illegible]. Judgment of the municipal court is affirmed.

J. McSURT [illegible] 1/1/38.

Bonham and Smith [illegible] concur.

40626

CHARLES H. DAVIS,
Appellant,

v.

RAYMOND R. DOWDLE,
Appellee.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

306 I.A. 274

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff filed a suit for an accounting against defendant. The cause was referred to a master in chancery, who heard the evidence. The master's report found that the equities were with defendant and recommended the dismissal of plaintiff's complaint for want of equity. The master overruled objections filed by plaintiff to the report. The chancellor thereafter overruled plaintiff's exceptions to the report, approved the report, and dismissed plaintiff's complaint for want of equity. Plaintiff appeals. Defendant failed to file a brief in this court.

The verified complaint alleges, in substance: (1) That Mary R. Davis, plaintiff's mother, died intestate on November 10, 1928, and plaintiff inherited from her estate, in moneys and securities, the sum of $23,346.51. (2) That plaintiff, previous to that time, was well acquainted with defendant, and as the result of a friendship of many years' standing and defendant's representations to plaintiff that defendant was well versed and skilled in the handling of funds and the making of investments, plaintiff, who had very little knowledge concerning such matters, believed said representations of defendant and was thereby induced to deliver to defendant, about January 10, 1929, his said entire inheritance; that defendant stated that he would invest said funds for plaintiff so that the principal of the same would be secure and a reasonable income would be derived therefrom for plaintiff; that defendant had complete charge of the receiving of said inheritance of plaintiff

40626

CHARLES H. DAVIS,
Appellant,

v.

RAYMOND H. DOWNS,
Respondent.

APPEAL FROM CIRCUIT COURT,
KING COUNTY.

306 1.4. 274

MR. JUSTICE DOLAND DELIVERED THE OPINION OF THE COURT.

Plaintiff filed a suit for an accounting against defendant. The cause was referred to a master in chancery, who heard the evidence. The master's report found that the equities were with defendant and recommended the dismissal of plaintiff's complaint for want of equity. The master overruled objections filed by plaintiff to the report. The court sustained the master's report, overruled plaintiff's exceptions to the report, approved the report, and dismissed plaintiff's complaint for want of equity. Plaintiff appeals. Defendant failed to file a brief in this court.

The verified complaint alleges, in substance: (1) That Mary E. Davis, plaintiff's mother, died intestate on October 1, 1928, and plaintiff inherited from her estate, in moneys and securities, the sum of [illegible]. ( ) That plaintiff, previous to that time, [illegible] associated with defendant, and as the result of a friendship of many years' standing [illegible] defendant's representations to plaintiff that [illegible] would [illegible] and skilled in the handling of funds and the making of investments, plaintiff, who had very little knowledge [illegible] relied upon defendant's representations of [illegible] to defendant, about January 1, 1929, [illegible] that defendant [illegible] so that the principal of the [illegible] and reasonable income would be [illegible] therefrom for [illegible]; that [illegible] had complete charge of the receiving of all investments of plaintiff

by reason of the authority granted to him by plaintiff, and plaintiff's knowledge as to the amount of his said inheritance is based solely upon the information furnished to him by defendant. (3) That after plaintiff's said inheritance was delivered to defendant, the latter proceeded to make a number of investments for and in behalf of plaintiff and paid to plaintiff, from time to time, various sums of money and advanced certain funds for him, which payments and advances were to be, and should be, deducted from plaintiff's funds entrusted to defendant. (4) That plaintiff has frequently demanded that defendant furnish him with a complete and itemized accounting of the exact amount of plaintiff's inheritance that defendant received, the investments that defendant made with the same, and the balance due to plaintiff from defendant as a result thereof; that defendant has partially complied with such demand by orally submitting to plaintiff certain figures, accompanied by defendant's notations, which indicate that defendant was indebted to plaintiff in the sum of at least $6,000; that defendant has refused to pay said sum, or any part thereof, to plaintiff. Plaintiff asks that an accounting may be taken of all dealings between plaintiff and defendant since defendant received said funds and securities of plaintiff, up to the present time; that defendant be decreed to pay to plaintiff what, if anything, should, upon the taking of said accounting, appear to be due him, plaintiff being ready and willing to pay, and hereby offering to repay, to defendant what, if anything, shall, upon the taking of said accounting, appear to be due to him; that any investments now in the hands of defendant made with plaintiff's funds, as aforesaid, be decreed to be the property of plaintiff, and defendant ordered to deliver same to plaintiff; and that plaintiff may have such other and further relief in the premises as to equity appertains and to the court shall seem meet.

Defendant's verified answer is as follows: "1. As to paragraph number one of said complaint, he neither admits nor denies the said allegations therein contained, but demands strict proof

by reason of the authority granted to him by plaintiff, and plaintiff's knowledge as to the amount of his said inheritance is based solely upon the information furnished to him by defendant. (3) That after plaintiff's said inheritance was delivered to defendant, the latter proceeded to make a number of investments for and in behalf of plaintiff and paid to plaintiff, from time to time, various sums of money and advanced certain funds for him, which payments and advances were to be, and should be, deducted from plaintiff's funds entrusted to defendant. (4) That plaintiff has frequently demanded that defendant furnish him with a complete and itemized accounting of the exact amount of plaintiff's inheritance that defendant received, the investments that defendant made with the same, and the balance due to plaintiff from defendant as a result thereof; that defendant has partially complied with such demand by orally submitting to plaintiff certain figures, accompanied by defendant's notations, which indicate that defendant was indebted to plaintiff in the sum of at least $6,000; that defendant has refused to pay said sum, or any part thereof, to plaintiff. Plaintiff asks that an accounting may be taken of all dealings between plaintiff and defendant since defendant received said funds and securities of plaintiff, up to the present time; that defendant be decreed to pay to plaintiff what, if anything, should, upon the taking of said accounting, appear to be due him, plaintiff being ready and willing to pay, and hereby offering to repay, to defendant what, if anything, shall, upon the taking of said accounting, appear to be due to him; that any investments now in the hands of defendant made with plaintiff's funds, as aforesaid, be decreed to be the property of plaintiff, and defendant ordered to deliver same to plaintiff; and that plaintiff may have such other and further relief in the premises as to equity appertains and to the court shall seem meet.

Defendant's verified answer is as follows: "1. As to paragraph number one of said complaint, he neither admits nor denies the said allegations therein contained, but demands strict proof

thereof. 2. As to paragraph number two, defendant denies that he ever represented to the plaintiff that he was well versed and skilled in the handling of funds and in the making of investments, and, further denies that he made any allegations to the plaintiff that the principal amount given to him would be secure and that a reasonable income would be derived therefrom for the plaintiff, and, further denies that he had complete authority in the handling of said funds, but that at all times he consulted with the said plaintiff regarding the investments to be made. 3. Defendant further states that he has given the plaintiff a complete and itemized account of the amount due the plaintiff, and denies that he is indebted to the plaintiff in the sum of $6,000."

The master found, from the pleadings and evidence submitted, as follows: That the court has jurisdiction of the parties to this cause and of the subject matter; that on November 10, 1928, Mary R. Davis, mother of plaintiff, died intestate; that the estate of Mary R. Davis was not admitted to probate but a division of the moneys and securities of Mary R. Davis was made among her heirs; that plaintiff received moneys and securities from said estate aggregating $22,846.51; that defendant had been a lifelong friend of plaintiff, and plaintiff entrusted defendant with all of the moneys and securities acquired by plaintiff as aforesaid, with the understanding that defendant would use said moneys and securities in trading in securities upon the stock market for and in behalf of plaintiff and in plaintiff's name; that defendant opened a stock account in the name of plaintiff and bought, sold and traded in stocks and securities pursuant to the agreement aforesaid; that defendant invested some of his own funds for the purchase of securities in said account; that from time to time defendant paid to plaintiff divers sums of money from said funds and stock account aggregating $15,156; that in August, 1936, plaintiff requested a statement of his account with defendant and said statement to plaintiff indicated a balance due

defendant and said statement to plaintiff indicated a balance due August, 1930, plaintiff transmitted a statement of his account with from said Pierce and Cook account, amounting to $[illegible], that in from time to time to the defendant paid to plaintiff given sums of money his own funds for the purchase of securities in said account; that pursuant to the agreement aforesaid; that plaintiff invested some of same of plaintiff, made, said and stated in books and securities in plaintiff's name; that defendant opened a joint account in the securities purchased by plaintiff as aforesaid, with the understanding that defendant took said money and securities in trust in securities upon the books of Pierce for and in behalf of plaintiff and and, further denies that he has any offsets to the plaintiff that the principal amount given to him would be secure and that a reasonable income would be derived therefrom for the plaintiff, and, further denies that he had complete authority in the handling of said funds, but that at all times he consulted with the said plaintiff regarding the investments to be made. 3. Defendant further states that he has given the plaintiff a complete and itemized account of the amount due the plaintiff, and denies that he is indebted to the plaintiff in the sum of $6,000."

The master found, from the pleadings and evidence submitted, as follows: That the court has jurisdiction of the parties to this cause and of the subject matter; that on November 1, 1929, Mary R. Davis, mother of plaintiff, died intestate; that the estate of Mary R. Davis was not entitled to probate but a division of the moneys and securities of Mary R. Davis was made among her heirs; that plaintiff received moneys and securities from said estate aggregating $22,840.71; that defendant had been a lifelong friend of plaintiff, and plaintiff authorized defendant with all of the moneys and securities received by plaintiff as aforesaid, with the understanding that defendant took said moneys and securities in trust in securities upon the books of Pierce for and in behalf of plaintiff and in plaintiff's name; that defendant opened a joint account in the name of plaintiff and defendant, said and stated in books and securities pursuant to the agreement aforesaid; that defendant invested some of his own funds for the purchase of securities in said account; that from time to time the defendant paid to plaintiff given sums of money from said Pierce and Cook account, amounting to $[illegible]; that in

plaintiff of $7,790.51, with the figures appearing in the corner thereof (plaintiff's Exhibit 2) "2295-500 700-400;" that defendant contends that the figures appearing at the bottom of plaintiff's Exhibit 2 (a statement of payments made by defendant to plaintiff) indicate additional cash payments made to plaintiff for which no receipts had been obtained by defendant, but constituted an accumulation of cash items; that plaintiff admits that he received the sums of $700, $400, and additional items not designated upon said statement, aggregating $160, leaving in dispute the cash items appearing upon plaintiff's Exhibit 2, $2,295 and $500; that defendant has failed to establish the payment of said items of $2,295 and $500 and said sums should be credited upon the amount due plaintiff; that the stock account aforesaid was opened by defendant on or about November 20, 1928, with the stock brokerage firm of Jackson Bros., Boesel & Co. in the name of plaintiff; that defendant introduced in evidence a statement of said brokerage account indicating that the transactions, as aforesaid, resulted in a loss in the sum of $10,582.58; that plaintiff contends that at the time said brokerage account was opened defendant agreed to pay to plaintiff fifty per cent of the profits to be derived from the purchase and sale of stocks and securities but that no losses would be chargeable against him; that defendant exercised supervision over said account and purchased and sold stocks and securities with the knowledge and consent of plaintiff and as his agent; that no understanding was had between said parties that no losses would be chargeable against the plaintiff; that although defendant represented to plaintiff that no losses would be sustained due to his knowledge and experience in dealing in securities he, defendant, did not guarantee plaintiff against losses; that the sum of $10,582.58 is chargeable against plaintiff; that the account of the parties hereto is as follows: Total moneys and securities received by defendant, $22,846.51; disbursements made by defendant to plaintiff, $15,156, $700, $400 and $160, totaling $16,416, and stock transaction losses chargeable to

plaintiff of $7,790.71, with the figures appearing in the corner thereof (plaintiff's Exhibit 2) "2295-300 700-400;" that defendant contends that the figures appearing at the bottom of plaintiff's Exhibit 2 (a statement of payments made by defendant to plaintiff) indicate additional cash payments made to plaintiff for which no receipts had been obtained by defendant, but constituted an accommodation of cash items; that plaintiff admits that he received the sums of $700, $400, and additional items not designated upon said statement, aggregating $100, leaving in dispute the cash items appearing upon plaintiff's Exhibit 2, $1,295 and $300; that defendant has failed to establish the payment of said items of $1,295 and $300 and said sums should be credited upon the amount due plaintiff; that the stock account aforesaid was opened by defendant on or about November 20, 1928, with the stock brokerage firm of Jackson Bros., Bossel & Co. in the name of plaintiff; that defendant introduced in evidence a statement of said brokerage account indicating that the transactions, as aforesaid, resulted in a loss in the sum of $6,388.38; that plaintiff contends that at the time said brokerage account was opened defendant agreed to pay to plaintiff fifty per cent of the profits to be derived from the purchase and sale of stocks and securities but that no losses would be chargeable against him; that defendant exercised supervision over said account and purchased and sold stocks and securities with the knowledge and consent of plaintiff and for his account; that no understanding was had between said parties that no losses would be chargeable against the plaintiff; that although defendant requested to plaintiff that no losses would be credited due to his lack of experience in dealing in securities he, defendant, did not reimburse plaintiff against losses; [illegible] in of $10,362.71 is chargeable against plaintiff; that the account of the parties herein is as follows: Total money and securities received by defendant, $[illegible]; disbursements made by defendant to plaintiff, $[illegible], $700, $400 and $100, totaling $[illegible], and stock transaction losses chargeable to

plaintiff, $10,582.58, making a total of $26,998.58 credits due defendant, which leaves a balance due defendant of $4,152.07; that the master therefore concludes that the equities are with defendant and recommends that the complaint be dismissed for want of equity.

Plaintiff contends that (1) "The report of the master in chancery, which was approved in its entirety by the decree of the chancellor disregarded defendant's admission of liability to the plaintiff contained in defendant's answer which disputed merely the amount of his liability to the plaintiff. The report and the decree were contrary to the undisputed evidence, to the computations offered by the defendant himself, and the conduct of the defendant in his dealings with the plaintiff;" (2) "The evidence established beyond doubt that the parties were to divide equally any profits on the stock trading transactions and the defendant expressly agrees to absorb all the loss, if any, resulting from such trading account. Whether the parties were considered as partners or parties to a joint venture, or otherwise, this was a fair arrangement and was disregarded by the master and the court."

Plaintiff contends that the decree of the Circuit court should be reversed and that the court be instructed "to enter a decree in favor of the plaintiff against the defendant to pay to the plaintiff $6,430.51 and interest." The transcript of the evidence is a short one and we have read it in its entirety. The all-important question upon this appeal is, What was the agreement between plaintiff and defendant as to the stock market transactions? After a careful consideration of the evidence bearing upon the agreement we have been unable to reach a satisfactory conclusion as to what the agreement was, and we are of the opinion that justice will be best served by a retrial of this cause. There would seem to be no necessity of referring the cause to a master, as the chancellor could hear it in a very short time. He would then be in a better position to pass upon the credibility of the witnesses and the weight that should be attached to their testimony. In addition,

plaintiff, $16,382.38, making a total of $42,998.38 credits due defendant, which leaves a balance due defendant of $4,152.07; that the master therefore concludes that the equities are with defendant and recommends that the complaint be dismissed for want of equity.

Plaintiff contends that (1) "The report of the master in chancery, which was approved in its entirety by the decree of the chancellor disregarded defendant's admission of liability to the plaintiff contained in defendant's answer which disputed merely the amount of his liability to the plaintiff. The report and the decree were contrary to the undisputed evidence, to the computations offered by the defendant himself, and the conduct of the defendant in his dealings with the plaintiff;" (2) "The evidence established beyond doubt that the parties were actively and actually joining on the stock trading transactions and the defendant expressly agreed to absorb all the loss, if any, resulting from such trading account. Whether the parties were considered as partners or parties to a joint venture, or otherwise, this was a fair arrangement and was disregarded by the master and the court."

Plaintiff contends that in spite of the "profit sharing" should be reversed and the cause be remanded "to enter a decree in favor of the plaintiff against the defendant to pay to the plaintiff $4,152.07 and costs." The preponderance of the evidence is a most confusing one, even for an law matter. The all-important question which calls upon the agreement between plaintiff and defendant is the [illegible] transactions. After a careful analytical review of the evidence bearing upon the agreement we have been unable to reach a satisfactory conclusion as to what the agreement was, and in view of the [illegible] will be best serve by a partial [illegible]. [illegible] to be no necessity of remanding the case for a [illegible], if the chancellor could have [illegible] a very short [illegible]. [illegible] a better position to pass upon the credibility of the witnesses and the weight that should be attached to their testimony. In addition,

if he deemed it necessary, he might make apt inquiries that would help to clear up the facts as to the arrangement between the parties.

The decree of the Circuit court of Cook county is reversed and the cause is remanded for a new trial.

DECREE REVERSED AND CAUSE REMANDED
FOR A NEW TRIAL.

Friend, P. J., and Sullivan, J., concur.

If he deemed it necessary, he might make apt inquiries that would help to clear up the facts as to the arrangement between the parties.

The decree of the circuit court of Cook county is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED
FOR A NEW TRIAL.

Friend, P. J., and Sullivan, J., concur.

40667

HUGH J. SANDS and MARY SANDS,
Appellees,

v.

SACK REALTY COMPANY, Incorporated,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

306 I.A. 275

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

A suit at law to recover $200 deposited with defendant, as earnest money, pursuant to a written contract between plaintiffs and Henry F. Jaeger, dated February 19, 1938, by the terms of which plaintiffs agreed to purchase a bungalow located at 6143 South Morgan street, Chicago. The case was tried by the court and there was a finding and judgment for plaintiffs against defendant for $200. Defendant appeals.

Plaintiffs' statement of claim alleges that defendant was engaged in the real estate business in Chicago; that about February 19, 1938, defendant inserted an advertisement in one of the local newspapers offering for sale certain real estate known as 6143 South Morgan street, Chicago; that plaintiffs, after seeing said advertisement, contacted an agent of defendant and, relying upon the representations and statements of said agent, entered into a sales contract for the purchase of said real estate and deposited $200 as earnest money with defendant; that said agent represented to plaintiffs, as an inducement to enter into said contract, "4. - - - that there were no negroes living in said neighborhood and that there were property restrictions against negroes in said neighborhood. 5. That the statements and representations made as aforesaid by the agent of the defendant that there were no negroes living in said neighborhood and that there were property restrictions against negroes were utterly false and untrue at the time they were made and were at that time known by the defendant and its agent to be false and untrue and were

made by the defendant by its agent with the fraudulent purpose of mulcting plaintiffs of their money. 6. That the plaintiffs on February 20, 1938, discovered that negroes were living in the same block as the above described real estate was located and they immediately attempted to rescind said sales contract, but this the defendant refused to do and has falsely and fraudulently claimed the said $200 deposited by the plaintiffs as earnest money as a forfeiture when the plaintiffs refused to further complete said sales contract."

In defendant's defense it denies "making the representations and statements to the plaintiffs as an inducement to enter into said contract that there were no negroes living in said neighborhood and that there were property restrictions against negroes in said neighborhood, as alleged in the fourth paragraph of the plaintiffs' statement of claim; denies making statements and representations that there were no negroes living in said neighborhood and that there were property restrictions against negroes; denies making any false and untrue statements and representations for the purpose of defrauding plaintiffs of their money, as alleged in the fifth paragraph of the plaintiffs' statement of claim; denies that the plaintiffs discovered on February 20, 1938, that negroes were living in the same block as the aforesaid real estate was located; denies that defendant falsely and fraudulently claimed the $200 deposit. Defendant was ready to consummate the contract for sale to plaintiffs; that plaintiffs failed to carry out the terms of purchase in accordance with the contract of purchase entered into by the plaintiffs."

The only contention of defendant that we deem necessary to consider is that "plaintiffs were in a position at the time of the alleged misrepresentation to have known or ascertained the truth or falsity thereof and having neglected to ascertain the fact cannot now complain." This contention must be sustained. Certain mountain peaks in the evidence preclude a recovery by plaintiffs. For nine months prior to the transaction in question they lived at 940 West

made by the defendant by it, along with the fraudulent purpose of misleading plaintiff of their money. 6. That the plaintiffs on February 26, 1928, discovered that persons were living in the same block as the above described real estate and leased and they immediately attempted to notify said defendant, but said the defendant refused to do and has wilfully and fraudulently claimed the said sale dependent on the plaintiffs [illegible] money and [illegible] when the plaintiffs refused to further [illegible] the sales contract."

In defendant's answer it denies making the representations and statements to the plaintiffs in [illegible] to water into said contract and there was no [illegible] living in said neighborhood and that there were [illegible] negroes in said neighborhood, [illegible] the statements of the plaintiffs' witnesses of likely [illegible] and representations that there were no negroes living in the neighborhood and that there were [illegible] sales making any false and [illegible] representations for the purpose of defrauding [illegible] money, [illegible] in the fifth paragraph of the plaintiff's [illegible] of which [illegible] that the plaintiffs discovered [illegible], that negroes were living in the same block as the [illegible] leased [illegible] denies that defendant [illegible] defendant was [illegible] for sale of plaintiffs that plaintiff [illegible] of [illegible] in accordance with [illegible] contract [illegible] money.

To conclude [illegible] the alleged [illegible] or failure [illegible] now complete. [illegible] must be sustained. [illegible] months prior to the transaction in question they lived [illegible] out

58th street, which is within three or four blocks of 6143 South Morgan street. At the trial it was conceded that since 1927 there have been restrictions against the sale of property in the neighborhood to negroes, so that the only alleged false representation is that defendant's agent represented to plaintiffs that there were no negroes living in the neighborhood. Both plaintiffs testified that the agent told them there were no colored people living in the neighborhood; that on the day they went with the agent to see the property it was snowing and they saw no people on the street near the property. The agent testified that on February 17, 1938, he drove plaintiffs from defendant's office to the property in question; that driving down Morgan street to the house, "you always see some colored people in the neighborhood." He further testified that Mrs. Sands asked him about the neighborhood and he told her that she probably knew more about the neighborhood than he did as she lived so close to the building in question; that Mrs. Sands asked him if there were any restrictions, to which he replied, "Yes, there have been restrictions since Siebeldt's came in on the street here, since 1927 or thereabouts;" that he did not recall Mr. Sands' asking him whether there were colored people living in the neighborhood; that there were colored people living within a block or two of the property; that a colored family lived in the 6600 block on Aberdeen street; that between sixty and seventy per cent of the people that live in the 65th block on Aberdeen street are colored; that colored people have lived at 65th and Aberdeen streets (two blocks west of Morgan) for forty years; that on Carpenter street and 65th there is a building that has been filled with colored people for forty years; that for many years there has been a sprinkling of colored people in Englewood, the district in which the property in question is located, but no colored people have been allowed to purchase property in that part of Englewood since the restrictions went into effect. It clearly appears from the testimony of Mr. Sands that plaintiffs knew that

[illegible] street, either in [illegible] or four blocks of [illegible] south Morgan street. In the usual [illegible] they have been restrictions against the sale of property [illegible] neighborhood to negroes, so that [illegible] is that determined [illegible] negroes living in the neighborhood. [illegible] the agent with them there are no colored people living in the neighborhood; [illegible] property is not [illegible] the property. [illegible] drove [illegible] that living [illegible] the house, [illegible] colored people in [illegible] are. [illegible] are probably [illegible] live so [illegible] this if there [illegible] there are [illegible] here, [illegible] [illegible] the [illegible] a block or [illegible] the [illegible] per cent of [illegible] street [illegible] Aberdeen [illegible] that [illegible] has been [illegible] many years [illegible] neighborhood, [illegible] but no [illegible] part of [illegible] appears from the [illegible] of [illegible] that

colored people lived within a few blocks of the property in question. Plaintiffs frequently shopped at Wieboldt's department store, located at 63d and Morgan streets, and "saw all kinds of colored people on 63d street;" they knew colored people lived at 63d and Aberdeen streets and on 59th street. Plaintiffs signed the contract on February 19, 1938. Mr. Sands testified that the next day they went to the place in question and he saw "colored folks playing around the front" of the place; that he talked with a few of the neighbors and that they all told him that colored people lived there; that one of the neighbors said, "There are three families a few doors down the street;" that they, plaintiffs, then notified the agent that they were not going to go through with the deal because there were colored people living there and that he, the agent, had told them that there were no colored people living there. Plaintiffs then purchased their present home, at 6741 Aberdeen street. The uncontradicted evidence shows that negroes live within a block of that place and that sixty to seventy per cent of the people living in the second block from the place are colored; that colored people have lived in that neighborhood for forty years. Mr. Sands admitted that colored people might live within a block of his present home; that he knew that they lived at 63d street and Aberdeen. His testimony shows that at the time of the alleged misrepresentation he could have ascertained the falsity of the alleged statement made by the agent by inquiring of any of the people who lived adjacent to the property in question. He did not do so until after he had signed the contract, and plaintiffs are now in no position to complain of the alleged misrepresentation. (See Bundesen v. Lewis, 368 Ill. 623.) Plaintiffs argue that Dr. Bundensen was an intelligent, educated, experienced man, whereas "Sands' circumstances in life bespeak a lower order of intelligence than that of Dr. Bundesen. Sands was a teamster." It is sufficient to say in answer to this argument that Dr. Bundesen was buying property on speculation, whereas plaintiffs were buying the place in question for a home. A teamster does not buy a home every day, and it would be expected that plaintiffs, before they purchased

colored people lived within a few blocks of the property in question. Plaintiffs frequently shopped at Mabolski's [illegible] because at 634 and Morgan stores, and saw all kinds of colored people on 634 street; they saw colored people living [illegible] and on 39th a [illegible]. Plaintiff signed the contract on January 11, 1932. Mr. [illegible] testified that the last day they went on the place in question had no [illegible] colored folks playing around the front of the place; that he talked with a few of the neighbors [illegible] they all told him that colored people lived there; that one of the neighbors said, "There are three families a few doors down [illegible]" that they, plaintiffs, then notified the agent that they [illegible] to go through with the deal [illegible] there and that he, the agent, [illegible] colored people living there. [illegible] Burdeen street. The records [illegible] within a block of [illegible] people living in the [illegible] colored people lived [illegible] forty years. Mr. [illegible] testified that [illegible] 634 street [illegible] personally knew that [illegible] his knowledge [illegible] he could have [illegible] the fact by inquiries of any of the people who lived adjacent to the property in question. [illegible] the deal after he [illegible] the contract, and [illegible] alleged misrepresentation [illegible] Plaintiffs argue that [illegible] misrepresentation [illegible] order of [illegible] It is sufficient to [illegible] to this [illegible] buying property on [illegible] place in question for [illegible] a temporary [illegible] day, and it would be [illegible] that of [illegible]

a home, would want to know something about the neighborhood. All that was required of plaintiffs was to use their eyesight and make a few inquiries, and they would immediately have learned that colored people lived in the neighborhood. After refusing to carry out their contract plaintiffs purchased a home near which many colored people lived. It is a reasonable inference from the evidence that the alleged false representation upon which they now rely was not the real reason that prompted plaintiffs to refuse to carry out the contract.

The judgment of the municipal court of Chicago is reversed.

JUDGMENT REVERSED.

Friend, P. J., and Sullivan, J., concur.

Friend, F. J., and Sullivan, J., concur.

40742

ROBERT LINDEN WILHITE,
Appellant,

v.

SARAH JANE WILHITE,
Appellee.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

306 I.A. 275

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

On October 11, 1933, Sarah Jane Wilhite (appellee in the instant case) filed a bill for divorce against Robert Linden Wilhite (appellant in the instant case). An answer was filed to the bill. On December 12, 1933, a decree of divorce was entered which contained, inter alia, the following: "It Is Further Ordered, Adjudged and Decreed by this Court that the defendant pay to the complainant the sum of Fifty Dollars per month, at the rate of Twenty-five Dollars on the first and fifteenth day of each and every month thereafter. It Is Further Ordered, Adjudged and Decreed by this Court that the complainant is to receive the sum of One Hundred Dollars from the defendant as and for her solicitor's fees." The provisions in the decree as to alimony and solicitor's fees were entered in accordance with a written stipulation of the parties. On August 29, 1938, appellant filed the instant "Complaint of Review and for Modification of Decree Obtained Through Fraud." The complaint prayed that the divorce decree "in so far as it respects the payment of alimony by the plaintiff herein to the defendant herein, and so obtained against this defendant by error, fraud and deception * * *, may be by this Court, set aside, cancelled and for naught esteemed, and the plaintiff herein be forever released from the effects and burden thereof." Appellee filed a motion to strike paragraphs 6, 9, 12, 14, 15, 16, 17, 18 and 19 of the complaint and to dismiss the complaint. The said paragraphs were stricken by order of the court, and appellant has not assigned error as to the action of the court in

40742

ROBERT LINDEN WILMITE,
appellant,

v.

SARAH JANE WILMITE,
appellee.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

306 IA. 275

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

On October 11, 1922, Sarah Jane Wilmite (appellee in the instant case) filed a bill for divorce against Robert Linden Wilmite (appellant in the instant case). An answer was filed to the bill. On December 12, 1922, a decree of divorce was entered which contained, inter alia, the following: "It is further ordered, adjudged and decreed by this Court that the defendant pay to the complainant the sum of fifty Dollars per month, at the rate of twenty-five Dollars on the first and fifte nth day of each and every month thereafter. It is further Ordered, Adjudged and Decreed by this Court that the complainant is to receive the sum of One Hundred Dollars from the defendant as and for her solicitor's fees." The provisions in the decree as to alimony and solicitor's fees were entered in accordance with a written stipulation of the parties. On August 29, 1923, appellant filed the instant "complaint to receive and for modification of Decree Obtained through Fraud." The complaint proved that the divorce decree in so far as it respects the payment of alimony by the plaintiff herein to the defendant herein, and so obtained against this defendant by error, fraud and deception * * * may be by this Court, set aside, cancelled and for naught esteemed, and the plaintiff herein be forever released from the effects and burden thereof." Appellee filed a motion to strike paragraphs 9, 12, 14, 15, 16, 17, 18 and 19 of the complaint and to dismiss the complaint. The said paragraphs were stricken by order of the court, and appellant has not assigned error as to the action of the court in

striking said paragraphs. The court also sustained appellee's motion to dismiss the complaint and ordered that the complaint be dismissed for want of equity. Appellant appeals.

The following are the errors relied upon for reversal: "1. The Court erred in dismissing the complaint for want of equity. 2. The Court erred in sustaining the motion of defendant to strike the complaint. 3. The Court erred in not finding the complaint of plaintiff sufficient in law and equity and in not finding it stated a good cause of action for relief in a Court of equity. 4. The decree of the Court is contrary to law. 5. The decree of the Court is contrary to equity." Under his "Points and Authorities" appellant raises eight points, but the "Argument" makes no attempt to follow the eight points and counsel for appellee are justified in contending that it is extremely difficult to follow the "Argument" of appellant. In appellant's argument counsel assumes that all of the paragraphs of the complaint are before this court for consideration and constantly bases arguments upon allegations contained in the paragraphs that were stricken. The complaint alleges that the provisions in the divorce decree in reference to alimony were in accord with the written agreement of appellant and appellee.

The alimony agreement (attached to the complaint) is as follows: "This Agreement by and between Sarah Jane Wilhite, hereinafter called first party, and Robert Linden Wilhite, hereinafter called second party, Witnesseth: Whereas, first party has filed in the Circuit Court of Cook County, Illinois, a bill for divorce against second party and second party is about to file an answer hereto denying the allegations of desertion in said bill, and both parties desiring to avoid litigation over the question of alimony and desiring to compromise the amount of alimony to be paid by second party in the event first party succeeds in obtaining a decree of divorce. Now, Therefore, it is agreed between the parties that there be entered in any decree of divorce which may be granted to first party an order adjudging and decreeing that second party pay to first party as

striking said paragraphs. The court also sustained appellee's motion to dismiss the complaint and ordered that the complaint be dismissed for want of equity. Appellant appeals.

The following are the errors relied upon for reversal:

"1. The Court erred in dismissing the complaint for want of equity. 2. The Court erred in sustaining the motion of defendant to strike the complaint. 3. The Court erred in not finding the complaint of plaintiff sufficient in law and equity and in not finding it stated a good cause of action for relief in a Court of equity. 4. The decree of the Court is contrary to law. 5. The decree of the Court is contrary to equity." Under his "Points and Authorities" appellant raises eight points, but the "Argument" makes no attempt to follow the eight points and counsel for appellee are justified in contending that it is extremely difficult to follow the "Argument" of appellant. In appellant's argument counsel assumes that all of the paragraphs of the complaint are before this court for consideration and constantly bases arguments upon allegations contained in the paragraphs that were stricken. The complaint alleges that the provisions in the divorce decree in reference to alimony were in accord with the written agreement of appellant and appellee.

The alimony agreement (attached to the complaint) is as follows: "This Agreement by and between Sarah Jane Hilliard, hereinafter called first party, and Robert Hinden Hilliard, hereinafter called second party, Witnesseth: Whereas, first party has filed in the Circuit Court of Cook County, Illinois, a bill for divorce against second party and second party is about to file an answer thereto denying the allegations of desertion in said bill, and both parties desiring to avoid litigation over the question of alimony and desiring to compromise the amount of alimony to be paid by second party in the event first party succeeds in obtaining a decree of divorce. Now, Therefore, it is agreed between the parties that there be entered in any decree of divorce which may be granted to first party an order adjudging and decreeing that second party pay to first party as

alimony for her maintenance and support the sum of Fifty Dollars per month until the further order of the Court, payable Twenty-five Dollars on the first and the fifteenth of each month following the date of such decree, and first party shall recover of second party her costs and expenses in the said divorce proceedings, including her solicitor's fee in the sum of One Hundred Dollars, being the balance unpaid. Witness the signatures of the parties hereto this 17th day of November, 1933. (Signed) Sarah Jane Wilhite Robert Linden Wilhite." Appellant alleges that he engaged Attorney Walter Hamilton (in accordance with a suggestion of appellee's attorney) to appear for him, to allow appellee to obtain a decree of divorce, and to see to it that the written agreement as to alimony was incorporated in the decree. Mr. Hamilton, who represented appellant in the divorce proceedings, appears for him in the present proceedings. Upon the oral argument of this cause Mr. Hamilton stated that he faithfully represented appellant in the divorce proceedings and that there was no collusion between counsel for appellee and himself in said proceedings; that he understood that his sole duty was to see that the written agreement of the parties was incorporated in the decree. However, the complaint shows that Mr. Hamilton filed an answer to appellee's bill for divorce; that later he signed a stipulation that the cause be heard by the court upon the complaint and answer "as if upon default," and the decree recites that Mr. Hamilton represented the defendant (appellant) upon the hearing before the court.

The complaint sets up a letter written by appellee's counsel to appellant after the bill for divorce had been filed, and as we understand appellant's position upon the instant appeal it is that the letter "was extremely ambiguous and unintelligible to defendant [appellant]" and that he was thereby tricked and deceived into signing the alimony agreement. We have carefully considered the letter and are satisfied that appellant's contention as to the effect of the letter is not justified. Appellant's counsel, assuming that certain stricken paragraphs of the complaint are before us for consideration, argues that

alimony for her maintenance and support the sum of fifty dollars per month until the further order of the court, payable twenty-five dollars on the first and the fifteenth of each month following the date of such order, the first party shall recover of second party her costs and expenses in the trial divorce proceeding, including her solicitor's fee in the sum of one hundred dollars, being the balance unpaid. Witness the signature of the parties hereto this 17th day of November, 1933. (signed) Sarah Jane Hilite. Robert Hilton Hilite." Appellant alleges that he engaged attorney Walter Hamilton (in accordance with a custom of appellee's attorney) to appear for him, to allow appellee to obtain a decree of divorce, and to see to it that the written agreement as to alimony was incorporated in the decree. Mr. Hamilton, who represented appellant in the divorce proceedings, appears for him in the present proceedings. Upon the oral argument of this case Mr. Hamilton stated to the Court that he represented appellant in the divorce proceedings and that there was no collusion between counsel for appellee and himself in said proceedings; that he understood that his sole duty was to see that the written agreement of the parties was incorporated in the decree. However, the complaint shows that, in addition filed in answer to appellee's bill for divorce, [illegible] be signed a stipulation that the cause be heard by the court upon [illegible] complaint and answer "as if upon default," and [illegible] decree [illegible] the defendant (appellant) upon the hearing before the court.

The complaint sets up a letter written by appellee's counsel to appellant [illegible] for divorce had been filed, and [illegible] understand appellant [illegible] upon the instant [illegible] that the letter "was [illegible] ignorance and unfamiliarity to [illegible] [appellant]" [illegible] and thereby induced [illegible] signing the alimony [illegible]. [illegible] have carefully considered the letter [illegible] satisfied that [illegible] contention [illegible] to the effect of the letter is not justified. [illegible] counsel, assuming that [illegible] paragraphs of the complaint are before us for consideration, argues that

said paragraphs contain allegations that it was appellant's understanding that he would only be obligated to pay fifty dollars per month for alimony for the period of two years and that after he had made said payments for said period the decree would be altered or satisfied so that appellant would be discharged from any further payments of alimony. While this argument is unwarranted, under the pleadings before us, we may say that in another paragraph, also stricken, it is alleged that appellant paid the alimony in accordance with the decree for a period of more than four years after the entry of the decree. The complaint in the instant case was not filed until August 29, 1938, nearly five years after the entry of the decree. After the entry of the decree, if a change had occurred in the economic status of appellant he had the right to appear at any time before the chancellor in the divorce proceedings and upon making a proper showing could have obtained a modification of the decree as to alimony. It is conceded that he never took any such action, and it is a reasonable assumption that he is financially able to meet the order as to alimony. In his complaint he sets up that since the divorce he has remarried and is residing with and supporting his second wife. This may account for his desire to have the order as to alimony set aside.

In addition to contending that appellant's complaint fails to make out a prima facie case of fraud, appellee has argued a number of other points in support of her contention that the decretal order in the instant case should be affirmed but we do not deem it necessary to consider them.

The decretal order of the Circuit court of Cook county dismissing the instant complaint for want of equity is affirmed.

DECRETAL ORDER DISMISSING COMPLAINT
FOR WANT OF EQUITY AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

said paragraphs contain allegations that it was appellant's understanding that he would only be obligated to pay fifty dollars per month for alimony for the period of two years and that after he had made said payments for said period the decree would be altered or satisfied so that appellant would be discharged from any further payments of alimony. This argument is unwarranted, under the pleadings before us, as may be seen in another paragraph, also stricken, it is alleged that appellant paid the alimony in accordance with the decree for a period of more than four years after the entry of the decree. The complaint in the instant case was not filed until August 29, 1938, nearly five years after the entry of the decree. After the entry of the decree, if a change had occurred in the economic status of appellant he had the right to appeal at any time before the chancellor in the divorce proceeding and upon making a proper showing could have obtained a modification of the decree as to alimony. It is conceded that he never took any such action, and it is a reasonable assumption that he is financially able to meet the order as to alimony. In his complaint it is noted that since the divorce he has remarried and is [illegible] supporting his second wife. This may account for his desire to have the order as to alimony set aside.

In addition to contending that appellant's complaint fails to make out a [illegible] case of fraud, appellee has argued a number of other points in support of his contention that the trial court in the instant case should be affirmed but we do not deem it necessary to consider them.

The [illegible] order of the circuit court of [illegible] county dismissing the [illegible] complaint for want of equity is affirmed.

DECREE AFFIRMED.

Friend, P. J., and Miller, J., concur.

40773

MARY THORNE,
Appellee,

v.

CHICAGO ORPHEUM COMPANY,
a corporation sued herein as
THE R. K. O. PALACE THEATRE,
a corporation,
Appellant.

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

306 I.A. 276

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An action for personal injuries. A jury returned a verdict finding defendant guilty and assessing plaintiff's damages at $1,250. Defendant appeals from the judgment entered upon the verdict.

The original complaint alleges that defendant owned and operated a theater wherein it furnished picture shows and vaudeville entertainment and solicited the patronage of the public; that on May 28, 1936, a cigarette package wrapped in cellophane had been thrown upon one of the stairways leading from the main floor of the theater to the first balcony; that customers were invited to walk upon said stairway and said cigarette package was allowed by defendant to remain on said stairway for a period of more than one hour immediately prior to the accident to plaintiff; that defendant well knew of the presence of said cigarette package at said place, or in the exercise of due care and caution should have known; "that on the date aforesaid plaintiff, in the exercise of due care and caution for her own safety, at the invitation of the defendant entered said theatre and walked up the said east stairway to the said first balcony and there attended the show for a period of several hours, and having seen said show the plaintiff started to leave defendant's premises and in so doing walked down the west stairway leading from the balcony to the first floor of defendant's theatre as aforesaid and as the plaintiff was in the act of descending said stairway and was at all times

40773

MARY THORNE,
Appellee,

v.

CHICAGO ORPHEUM COMPANY,
a corporation and herein as
THE R. K. O. PALACE THEATRE,
a corporation,
Appellant.

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

306 I.A. 276

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An action for personal injuries. Jury returned a verdict finding defendant guilty and assessing plaintiff's damages at $1,250. Defendant appeals from the judgment entered upon the verdict.

The original complaint alleges that defendant owned and operated a theater wherein in furnished pictures shows and vaudeville entertainment and collected the patronage of the public; that on May 22, 1936, a cigarette package wrapped in cellophane had been thrown upon one of the stairways leading from the main floor of the theater to the first balcony; that customers were invited to walk upon said stairway and said cigarette package was allowed by defendant to remain on said stairway for a period of more than one hour immediately prior to the accident to plaintiff; that defendant well knew of the presence of said cigarette package on said place, or in the exercise of due care and caution should have known; that on the date aforesaid plaintiff, in the exercise of due care and caution for her own safety, at the invitation of the defendant entered said theatre and walked up the said stairway to the first balcony and there attended the show for a period of several hours, and having seen said show the plaintiff started to leave defendant's premises and in so doing walked down the west stairway leading from the balcony to the first floor of defendant's theatre [illegible] the plaintiff was in the [illegible] coming into contact with the [illegible] all times

in the exercise of due care and caution for her own safety, and by reason of and in direct consequence of the negligence and carelessness of the defendant, its servants, agents and employees, in allowing said cigarette package to be and remain on said stairway aforesaid, plaintiff stepped upon said cigarette package and was thereby caused to slip and fall violently down the remainder of said stairway and to and upon the floor there;" and that by reason of the premises and said negligence of defendant plaintiff sustained permanent injuries. Plaintiff filed three additional counts: Count one charges defendant with negligently permitting a cigarette package, wrapped in a slippery substance, cellophane, to be and remain upon one of the stairways, and plaintiff, while exercising due care, stepped upon said package and was caused to fall, etc. Count two alleges the negligence charged in count one and also charges that defendant permitted the stairways to become overcrowded with patrons, thereby rendering the stairway dangerous. Count three adopts the allegations of plaintiff's original complaint and further alleges "that on the date aforesaid it was the duty of the defendant, through its agents and servants, to keep the stairways leading from the main floor to the first balcony of said theatre free and clear of all obstructions or of objects liable to cause persons rightfully using said stairways to slip and fall, but that the defendant, carelessly and negligently disregarding said duty, through its agents and servants, carelessly and negligently suffered and permitted a certain cigarette package wrapped in a smooth and slippery substance, to wit, cellophane, to be and remain upon one of the stairways leading from the main floor to the first balcony in said theatre, to wit, the west stairway, upon which stairway patrons of said theatre were invited to walk and otherwise to use during performances of a show or entertainment in said theatre which was attended by numerous persons including the plaintiff, whereby said stairway became and was rendered dangerous to persons rightfully using same in going to and from the first balcony of said theatre for the

in the exercise of due care and caution for her own safety, and by reason of and in proximate consequence of the negligence and carelessness of the defendant, its servants, agents and employees, in allowing said cigarette package to be and remain on said stairway aforesaid, plaintiff stepped upon said cigarette package and was thereby caused to slip and fall violently down the remainder of said stairway and to land upon the floor there;" and that by reason of the premises and said negligence of defendant, its servants, employees, agents and invitees, plaintiff filed three additional counts. Count one charges defendant with negligently permitting a cigarette package, argued in a slippery substance, calculated, to be and remain upon one of the stairways and plaintiff, while exercising due care, stepped upon said package and was caused to fall, etc. Count two alleges the negligence charged in count one and also charges that defendant permitted the stairways to become overcrowded with patrons, thereby rendering the stairway dangerous. Count three adopts the allegations of plaintiff's original complaint and further alleges "that it was the duty of the defendant, through its agents and servants, to keep the stairways leading from the main floor to the balcony of said theatre free and clear of all obstructions or slippery substances, because persons rightfully using said stairway to slip and fall, but that the defendant, by its agents and servants, carelessly and negligently allowed and permitted a cigarette package to remain in said stairway, slippery substance, to fall, slide, or be and remain upon one of the stairways leading from the main floor to the third balcony in said theatre, to wit, the first stairway, a certain slippery substance of said theatre were invited to walk and otherwise to use during performances of said theatre, as aforesaid, in said theatre which was attended by many persons including the plaintiff, thereby said stairway became and remained dangerous to persons rightfully using same in going to and from the first balcony of said theatre for the

purpose of viewing said show or entertainment or of returning therefrom."

Defendant, by its answer to the original complaint and its answers to the additional counts, denied that it or its agents or servants put the cigarette package upon the stairway; denied that it permitted said package to remain upon the stairway; denied that it knew of the presence of any cigarette package upon the stairway; and denied that it was negligent in any manner in the operation of its theatre.

No proof was offered to support the allegation in the original complaint that defendant permitted the cigarette package to remain upon its staircase for more than one hour. No proof was offered to sustain the charge in additional count two that defendant permitted the stairway to become overcrowded with patrons, thereby rendering the stairway dangerous. As will hereafter appear, plaintiff testified that there were no persons upon the stairway in front of her and that the people descending the stairway in back of her "were not on top of her or anything like that." Plaintiff does not claim that any agent of defendant placed the cigarette package upon the stairway.

We need only notice three of the errors relied upon by defendant for reversal, viz: That the trial court erred in refusing to allow defendant's written motion for a directed verdict at the close of all the evidence; that the trial court erred in refusing to allow defendant's written motion for judgment notwithstanding the verdict, filed after the return of the verdict of the jury and before the entering of judgment herein; that the trial court erred in refusing to allow defendant's written motion for a new trial presented after the return of the verdict and before the entering of judgment herein.

Defendant's theory is that before it could be charged with negligence it was necessary to prove either that it had actual knowledge of the presence of the cigarette package upon the staircase or that the package had been upon the staircase for a sufficient

purpose of vicarious liability or entertainment or of receiving therefrom."

Defendants, by its answer to the original complaint and its answers to the additional complaints, denied that it or its agents or servants put the slip-cover receiver upon the delivery truck; that it permitted said package to remain upon the delivery truck; that it knew of the presence of the slip-cover receiver upon the delivery truck; and denied that it was negligent in the operation of the operation of its theatre.

No proof was offered to support the allegation in the original complaint that a defendant permitted the higher the package to remain upon its sidewalk for more than one hour. No proof was offered to sustain the allegations in additional counts, two that defendant permitted the [illegible] to become overcrowded with people, thereby rendering the delivery [illegible] [illegible], plaintiff testified that there were no persons upon the delivery in front of her and that the [illegible] the delivery in back of her "were not on top of her or [illegible] like that." Plaintiff does not claim that any agent of defendant [illegible] the slip-cover receiver upon the delivery.

[illegible] only [illegible] of the [illegible] upon by defendant [illegible], viz: [illegible] in a trading to allow a [illegible] written motion for [illegible] verdict as the close of all the evidence; that the trial court erred in refusing to allow [illegible] the verdict, [illegible] the [illegible] and [illegible] the conduct of judgment [illegible] in refusing to allow [illegible] motion for a new trial [illegible] after the return of the verdict and before the entry of judgment [illegible].

[illegible] theory is that [illegible] with negligence [illegible] necessary to prove either [illegible] knowledge of the presence of the slip-cover receiver [illegible] case or that the [illegible] had been upon [illegible] for [illegible]

period of time to charge defendant with constructive notice of its presence there; that plaintiff's evidence fails to make out a prima facie case that defendant had actual or constructive notice of the presence of the cigarette package upon the stairway; that in that state of the record it was the duty of the trial court to allow defendant's written motion for a directed verdict at the close of the case, and that the trial court further erred in refusing to allow defendant's written motion for judgment notwithstanding the verdict and in refusing to allow defendant's written motion for a new trial. Plaintiff concedes that her case stands solely upon the theory of constructive notice but argues that there was evidence that the cigarette package "was negligently permitted to remain on the staircase for a sufficient length of time that notice to defendant could be implied," and that, therefore, the trial court was justified in submitting the case to the jury.

The evidence shows that plaintiff, accompanied by her husband, attended defendant's theatre, known as the Palace Theatre, on the afternoon of May 26, 1936. They had seats in the balcony, saw an entire performance, and then started to leave the theatre. The last flight of stairs leading from the balcony to the lobby is known as the west grand staircase. It is approximately seven feet in width and has twenty-one steps. There is a handrail on each side of the staircase. Directly above the staircase is a large chandelier that contains a hundred or more lights. There are also lights along the wall. At the top of the staircase is a chandelier that contains forty or fifty lights. All of these lights were lit at the time of the accident. The stairway is carpeted and has ozite padding. The theatre in question is a large one, situated on Randolph street in the loop. It seats about 2,500 people. "Business was very good on May 26, 1936." At the time of the accident people were waiting in the lobby and upon the sidewalk outside of the theatre. Plaintiff testified that she walked along "like a normal person would going out of the theatre;" that

period of time to charge defendant with constructive notice of its presence there; that plaintiff's evidence fails to make out a prima facie case that defendant had actual or constructive notice of the presence of the cigarette package upon the stairway; that in that state of the record it was the duty of the trial court to allow defendant's written motion for a directed verdict at the close of the case, and that the trial court further erred in refusing to allow defendant's written motion for judgment notwithstanding the verdict and in refusing to allow defendant's written motion for a new trial. Plaintiff concedes that her case stands solely upon the theory of constructive notice but argues that there was evidence that the cigarette package "was highly probable to remain on the staircase for a sufficient length of time that notice to defendant could be implied," and that, therefore, the trial court was justified in submitting the case to the jury.

The evidence shows that plaintiff, accompanied by her husband, attended a motion picture, known as the Palace Theatre, on the afternoon of [illegible] 6, 1926. They had gone in the balcony, saw an entire performance, and then started to leave the theatre. The last flight of stairs leading from the balcony to the lobby is known as the west grand staircase. It is approximately seven feet in width and has twenty-one steps. There is a landing on each side of the staircase. Midway above the staircase is a large chandelier that contains a number of [illegible] lights. There are also lights along the wall. At the top of the staircase is a chandelier that contains forty or fifty lights. All of these lights were lit at the time of the accident. The [illegible] and has only [illegible]. The theatre in question is [illegible], standing on [illegible] in the loop. It seats about [illegible]. "Business was very good on July 26, 1926." At the time of the accident people were [illegible] in the lobby and upon the sidewalk outside of the theatre. Plaintiff testified that she walked along "like a normal person would [illegible] the theatre;" that

before she started to descend the stairs she had put on her coat; that as she started to descend the stairway there was no one in front of her upon the stairway; that "there were probably a couple hundred people coming out in back of me," who were leaving the theatre; that the people back of her "were not on top of me or anything like that;" that she descended the stairway until she got to about eight steps from the bottom "and I looked down and happened to notice a cellophane empty package of cigarettes. I tried to avoid it. I seen it but my foot was on it and I raised myself back to try and catch something but there was nothing there. * * * my foot went from under me and I landed head first into the lobby of the theatre on my two hands and mostly to the right side which was on the right knee. * * * Just as I was stepping down on this cigarette package I tried to pull myself erect, pull myself back trying to avoid a fall, but I couldn't." Plaintiff further testified that she had attended performances at the Palace theatre "off and on for quite a while" but that she did not think she was ever in the balcony before; that as she went down the stairs she did not have hold of the hand railing; that she noticed that the cigarette package was empty; that it was not "crumbled." "Q. The package was not torn apart? A. No. Q. It was just in its regular form? A. Yes;" that when she reached the bottom of the stairs the cigarette package was stuck to her foot; that the package (introduced in evidence) was then in substantially the same condition as it was at the time of the accident "except that the cellophane is loose;" that her husband took the package off her heel as they were picking her off the floor. Plaintiff's husband testified that when his wife was close to the bottom of the stairway he saw her fall down the stairs; that when he got to the bottom of the stairs he picked her up and took a cigarette package from the heel of her shoe; that when she sat down he noticed that there was some more cellophane on her shoe and he took her shoe off and took the cellophane off the heel; that when he was going down the stairway there was nobody in front

before she started to descend the stairs she had put on her coat; that as she started to descend the stairway there was no one in front of her upon the stairway; that there were probably a couple hundred people coming out in back of her, [illegible] were leaving the theatre; that the people back of her "were not on top of me or anything like that;" that she descended the stairway until she got to about eight steps from the bottom "and I looked down and happened to notice a cellophane empty package of cigarettes. I tried to avoid it. I seen it but my foot was on it and I raised myself back to try and catch something but there was nothing there, * * * my foot went from under me and I landed from there into the lobby of the theatre on my two hands and mostly so on right side which was on the right knee. * * * Just as I was stepping down on this cigarette package I tried to pull myself erect, pulling my self back trying to avoid a fall, but I couldn't." Plaintiff further testified that she had attended performances at the [illegible] theatre "off and on for quite a while" but that she did not think she had ever been in the lobby before; that as she was coming [illegible] she did not make [illegible] of the hand railing; that she noticed [illegible] package [illegible] stairway; that it was not crumpled." "Q. The package was not torn apart? A. No. Q. It was just lying there flat on the step? A. Yes." And when she reached the bottom of the stairs [illegible] to her room; that the package (cellophane) [illegible] substantially the same condition [illegible] the time of the [illegible] except that the cellophane is loose; [illegible] off her heel as they were picking her off the floor. Plaintiff's husband testified that when his wife was close to the bottom of the stairway he saw her fall from the stairway [illegible] the bottom of the stairway [illegible] the heel of shoe that when she sat down he noticed that there was some [illegible] cellophane on her shoe and he took her shoe off and took the cellophane off the heel; that when he was going down the stairway there was nobody in front

of them on the stairway; that "there might have been some people in back of me, I didn't look back to see." On cross-examination the witness stated that as he went down the stairway he was putting on his coat; that he did not see the cigarette package at any time until he saw it on plaintiff's right shoe when she was at the bottom of the stairway; that he was not watching his wife at the moment she fell; that as he descended the stairway he was putting on his coat and was looking ahead, not down, and that was the reason he did not see the cigarette package on the step. The undisputed evidence is that at the time of the accident there were about thirty-two ushers and doormen in the theatre and that part of their duties was to keep a lookout for anything that might be wrong, keep a lookout for defective lights, and to pick up anything that might be on the floor or staircase. At the time in question defendant employed two men whose sole duty was to patrol the theatre. Each carried a brass container and a pickup pan and a little broom with which he collected "everything that's dropped on the floor." They patrolled the theatre continuously. The evidence of one of the patrolmen is that they patrolled the staircase in question every five minutes.

Plaintiff concedes that it was necessary for her to prove that the cigarette package "was negligently permitted to remain on the staircase a sufficient length of time that notice to defendant could be implied." In order to support her contention that the cigarette package remained on the stairway a sufficient length of time to warrant the application of the doctrine of constructive notice plaintiff is forced to draw unwarranted conclusions from the evidence. Plaintiff's evidence is to the effect that after the performance was finished she and her husband were the first to leave the balcony by the staircase, but the argument that a jury might well find that it took plaintiff not less than eight or ten minutes to put on her coat and walk down thirteen steps is not supported by the evidence. Neither plaintiff nor her husband testified as to the length of time that elapsed between their approach to the stairway and the accident.

of them on the stairway; that "there might have been some people in back of me, I didn't look back to see." On cross-examination the witness stated that as he went down the stairway he was putting on his coat; that he did not see the cigarette package at any time until he saw it on plaintiff's right arm when she was at the bottom of the stairway; that he was not watching his wife at the moment she fell; that as he descended the stairway he was putting on his coat and was looking ahead, not down, and that was the reason he did not see the cigarette package on the step. The unchallenged evidence is that at the time of the accident there were about thirty-two members and doormen in the theatre and that part of their duties was to keep a lookout for anything that might be wrong, keep a lookout for defective lights, and to pick up anything that might be on the floor or staircase. At the time in question defendant employed two men whose sole duty was to patrol the theatre. Each carried a brass container and a pickup pan and a little broom with which he collected "everything that's dropped on the floor." They patrolled the theatre continuously. The evidence of one of the patrolmen is that they patrolled the staircase in question every five minutes.

Plaintiff concedes that it was necessary for her to prove that the cigarette package "was negligently permitted to remain on the staircase a sufficient length of time that notice to defendant could be implied." In order to support her contention that the cigarette package remained on the stairway a sufficient length of time to warrant the application of the doctrine of constructive notice plaintiff is forced to draw unwarranted conclusions from the evidence. Plaintiff's evidence is to the effect that after the performance was finished she and her husband were the first to leave the balcony by the staircase, but the argument that a jury might well find that it took plaintiff not less than eight or ten minutes to put on her coat and walk down thirteen steps is not supported by the evidence; neither plaintiff nor her husband testified as to the length of time that elapsed between their approach to the stairway and the accident.

Plaintiff testified that she walked along "like any normal person would going out of the theatre." That she and her husband did not proceed slowly in leaving the theatre is clear. She testified that as she started to descend the stairway "there were probably a couple hundred people coming out in back of me," who were also leaving the theatre after the performance. The argument of plaintiff's counsel that between the time plaintiff approached the stairway and the time of the accident probably eight or ten minutes elapsed, is refuted by the evidence. Plaintiff introduced the cigarette package in evidence and the argument is made that its condition warrants the assumption that it had been "trod on by persons on the staircase before plaintiff even reached the balcony or before the end of the performance and a sufficient time for defendant to have had an employee inspect the stairs and to have discovered and removed the object." The exhibit warrants no such assumption or argument. Indeed, plaintiff testified that she noticed that the cigarette package was empty; that it was not "crumbled." "Q. The package was not torn apart? A. No. Q. It was just in its regular form? A. Yes." The complaint was based upon the theory of fact that defendant "permitted a certain cigarette package wrapped in a smooth and slippery substance, to wit, cellophane, to be and remain upon one of the stairways leading from the main floor to the first balcony in said theatre * * *. Plaintiff stepped upon said cigarette package covered with cellophane as aforesaid and was thereby caused to slip and fall violently down the remainder of said stairway," etc. Plaintiff testified that as she was stepping on the eighth step she observed "the package, an empty package of cigarettes, a cellophane package." Questioned by her counsel the following occurred: "Q. What, if anything, did you notice or observe with reference to this package of cigarettes with cellophane on it? What did you notice about it as you stepped on to it, if anything? A. I noticed it was quite slippery, naturally." It is a matter of common knowledge that in a theatre like the one in question, where performances start in the morning and continue until midnight, people, after the first performance is concluded, are continually

Plaintiff testified that she walked along "like any normal person would going out of the theatre." That she and her husband did not proceed slowly in leaving the theatre is clear. She testified that as she started to descend the stairway "there were probably a couple hundred people coming out in back of me," who were also leaving the theatre after the performance. The argument of plaintiff's counsel that between the time plaintiff approached the stairway and the time of the accident probably eight or ten minutes elapsed, is refuted by the evidence. Plaintiff introduced the cigarette package in evidence and the argument is made that its condition warrants the assumption that it had been "trod on by persons on the staircase before plaintiff even reached the balcony or before the end of the performance and a sufficient time for defendant to have had an employee inspect the stairs and to have discovered and removed the object." The exhibit warrants no such assumption or argument. Indeed, plaintiff testified that she noticed that the cigarette package was empty; that it was not "crumbled." "Q. The package was not torn open? A. No. Q. It was just in its regular form? A. Yes." The complaint was based upon the theory of fact that defendant "permitted a certain cigarette package wrapped in a smooth and slippery substance, to wit, cellophane, to be and remain upon one of the stairways leading from the main floor to the first balcony in said theatre * * *. Plaintiff stepped upon said cigarette package covered with cellophane as aforesaid and was thereby caused to slip and fall violently down the remaining of said stairway," etc. Plaintiff testified that as she was stepping on the eighth step she observed "the package, an empty package of cigarettes, a cellophane package." Questioned by her counsel the following occurred: "Q. Did, if anything, did you notice or observe with reference to this package of cigarettes with cellophane on it: What did you notice about it as you stepped on to it, if anything? A. I noticed it was quite slippery, naturally." It is a matter of common knowledge that in a theatre like the one in question, where performances start in the morning and continue until midnight, people, after the first performance is concluded, are continually

leaving the theatre. In our judgment the evidence in the instant case would not justify a finding that the cigarette package had been on the stairway for more than two or three minutes and we are constrained to hold that plaintiff's evidence fails to show that the cigarette package was upon the step for such a length of time that defendant could or should, by the exercise of ordinary care, have known of its presence. It must be borne in mind that a theatre operator is not an insurer of the safety of its patrons.

The trial court erred in submitting the cause to the jury and in refusing to allow defendant's written motion for judgment notwithstanding the verdict of the jury, filed before the entry of judgment.

The judgment of the Superior court of Cook county is reversed.

JUDGMENT REVERSED.

Friend, P. J., and Sullivan, J., concur.

leaving the theatre. In our judgment the evidence in the instant case would not justify a finding that the cigarette package had been on the stairway for more than two or three minutes and we are constrained to hold that plaintiff's evidence fails to show that the cigarette package was upon the step for such a length of time that defendant could or should, by the exercise of ordinary care, have known of its presence. It was no bonus in mind that a theatre operator is not an insurer of his safety of his patrons.

The trial court erred in granting the motion for judgment notwithstanding the verdict of the jury, filed before the entry of judgment.

The judgment of the superior court of Fulton county is reversed.

JUDGMENT REVERSED.

Frieand, P. J., and Felton, J., concur.

The judgment of the superior court of Fulton county is reversed.

JUDGMENT REVERSED.

Frieand, P. J., and Felton, J., concur.

41035

SOPHIA Y. LAITA,
Appellant,

v.

WALTER LAITA,
Appellee.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

306 I.A. 276

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

On January 31, 1939, a decree of divorce was entered in favor of plaintiff. On February 27, 1939, within the thirty-day period fixed by the statute (Ill. Rev. Stat. 1939, ch. 110, par. 174, sec. 50), plaintiff filed a verified petition for a modification of the decree. She appeals from an order dismissing her petition for want of equity.

The decree of divorce contained the following:

"It Is Therefore Further Ordered, Adjudged and Decreed by this Court that the sum of Three Hundred Dollars be paid by Defendant to Plaintiff, and when so paid, shall stand as advance support money for a period of one year from the date hereof, and shall be used by Plaintiff for the support and maintenance of Walter Laita, Jr., the minor child of the parties, and that upon the expiration of one year from the date hereof, Defendant shall pay to Plaintiff the sum of Twenty Five Dollars per month on the first day of each and every month thereafter for the support of said child.

"And it further appearing to the Court that Plaintiff and Defendant have heretofore entered into a property settlement agreement, and Plaintiff in open Court having waived all right to alimony, dower, property rights and solicitor's fees herein,

"It Is Therefore Further Ordered, Adjudged and Decreed by this Court that Plaintiff waive such alimony, dower, property rights and solicitor's fees which in the absence of such waiver she would be entitled."

After the entry of the decree plaintiff employed new counsel and filed her petition, which reads as follows:

4103J

SOPHIA Y. MAITA,
Appellant,

v.

WALTER MAITA,
Appellee.

APPEAL FROM SUPERIOR COURT
OF KING COUNTY.

306 P.A. 276

MR. JUSTICE SCHALLAN DELIVERED THE OPINION OF THE COURT.

On January 21, 1929, a decree of divorce was entered in favor of plaintiff. On February 27, 1929, within the thirty-day period fixed by the statute (Rem. rev. stat. 1934, no. 110, par. 174, sec. 30), plaintiff filed a verified petition for a modification of the decree. The appeals from an order dismissing her petition for want of equity.

The decree of divorce contained the following:

"It is therefore further ordered, adjudged and decreed by this court that the sum of three hundred dollars be paid by defendant to plaintiff, and when so paid, shall stand as advance support money for a period of one year from the date hereof, and shall be used by plaintiff for the support and maintenance of Walter Maita, Jr., the minor child of the parties, and that upon the expiration of one year from the date hereof, defendant shall pay to plaintiff the sum of twenty-five dollars per month on the first day of each and every month thereafter for the support of said child.

"And it is further adjudging to the court that plaintiff and defendant have heretofore entered into a property settlement agreement, and plaintiff in open court having waived all right to alimony, dower, property rights and solicitor's fees herein,

"It is therefore further ordered, adjudged and decreed by this court that plaintiff waive such alimony, dower, property rights and solicitor's fees when in the absence of such waiver she would be entitled."

After the entry of the decree plaintiff employed new counsel and filed her petition, which reads as follows:

"1. * * *

"2. That prior to the filing of the complaint herein defendant induced petitioner to sign certain papers in 1936 conveying his interest in a two story brick building, located at 6101 South State Street, Chicago, Illinois, to take care of his creditors and told petitioner he was no longer the owner; that he was broke and could give her no support for her and their minor child;

"3. * * * that in the Fall of 1937 she again separated from defendant and was conducting a business in Clearing, Illinois, and on defendant's pleadings to come back to him, she sold said business for $1500 and gave defendant $400 to buy furniture and furnishings for their proposed home, which he did.

"4. * * * that shortly thereafter, because she refused to give defendant the balance of said $1500 he put her out of his home and about May 30th, 1938 struck and beat her and refused to provide for her and the child;

"5. * * * that she consulted a lawyer and prepared to file a suit for divorce and upon the pleadings of defendant asking her to wait until he had obtained his citizenship papers and that he would reimburse her for monies she spent on the care, support and education of their minor child, Walter Laita, Jr., aged ten years, she abandoned said proceedings;

"6. * * * that about December, 1938, her mother gave her a tavern at 2001 Canalport Street, Chicago, but petitioner did not have money to pay for a license so she could operate said tavern to earn a living for herself and the minor child of the parties hereto;

"7. * * * that defendant came to petitioner and stated if she would secure a divorce he would give her $300 for the tavern license, reimburse her for monies she spent on the care, support and education of their minor child and give her the furniture and furnishings;

"8. * * * that defendant took petitioner to his attorney, William J. Gleason, who prepared and filed on December 21st, 1938 a

"1. * * *

"2. That prior to the filing of the complaint herein defendant induced petitioner to sign certain papers in 1936 conveying his interest in a two story brick building, located at 6101 South State Street, Chicago, Illinois, to take care of his creditors and told petitioner he was no longer the owner; that he was broke and could give her no support for her and their minor child;

"3. * * * that in the fall of 1937 she again separated from defendant and was conducting a business in Olesring, Illinois, and on defendant's pleading to come back to him, she sold said business for $1500 and gave defendant $4[illegible] to buy furniture and furnishings for their proposed home, which he did.

"4. * * * that shortly thereafter, because she refused to give defendant the balance of said $1500 he put her out of his home and about May 30th, 1939 struck and beat her and refused to provide for her and the child;

"5. * * * that she consulted a lawyer and prepared to file a suit for divorce and upon the pleadings of defendant asking her to wait until he had obtained his citizenship papers and that he would reimburse her for monies she spent on the care, support and education of their minor child, Walter Leslie, Jr., aged ten years, she abandoned said proceedings;

"6. * * * that about December, 1939, her mother gave her a tavern at 2001 Hamilton street, Chicago, but petitioner did not have money to pay for a license so she could operate said tavern to earn a living for herself and the minor child of the petition herein;

"7. * * * that defendant came to petitioner and stated if she would secure a divorce he would give her $500 for the tavern license, reimburse her for monies she spent on the care, support and education of their minor child and give her the furniture and furnishings;

"8. * * * that defendant took petitioner to his attorney, William J. Gleason, who prepared and filed on December 21st, 1938 a

bill for divorce for petitioner;

"9. * * * that on January 16th, 1939 before the hearing in court, she protested and told defendant and * * * [said] attorney, that the proposed decree did not incorporate the agreement of defendant to pay the $300 for tavern license and reimburse her for money spent on the care, support and education of the minor child and for the return of her furniture and furnishings, and defendant told petitioner that if she did not go through with the proceedings, they would find her body in the river and stated he would give her the aforesaid things as agreed upon, and [said] attorney * * * told petitioner he would see that she got the $300 tavern license money, the money she spent on the child's care, support and education and the furniture and furnishings, and that she should not say anything about them in her testimony;

"10. * * * that * * * [said] decree of divorce was entered in favor of petitioner which provided that defendant pay in advance to petitioner $300 for one year's support money for the minor child and upon the expiration of a year the sum of $25 was to be paid by defendant to petitioner each month for support of child, and further that petitioner waived all right to alimony, dower, property rights and solicitor's fees;

"11. * * * states that defendant has refused to pay the money, to-wit $1081.20 which she spent for the care, support and education of the minor child, refused to give her the furniture and that although she notified [said] attorney * * *, he has failed to secure the aforesaid things for petitioner as agreed upon;

"12. * * * that because of defendant's fraudulent promises and the assurances of [said attorney] * * * she was mislead, deprived and cheated of her property rights and proper allowance for the care, support and education of the minor child of the parties;

"13. * * * states that all during the marriage of the parties hereto she worked and supported the minor child of the parties hereto and since September 6th, 1937 has been sending said child with the consent of defendant to Bishop Quarter Junior Military

bill for divorce for petitioner;

"9. * * * that on January 16th, 1929 before the writing in court, she protested and told defendant and * * * [said] attorney, that the proposed decree did not incorporate the agreement of defendant to pay the $300 for tavern license and reimburse her for money spent on the care, support and education of the minor child and for the return of her furniture and furnishings, and defendant told petitioner that if she did not go through with the proceedings, they would find her body in the river and stated he would give her the aforesaid things as agreed upon, and [said] attorney * * * told petitioner he would see that she got the $300 tavern license money, the money she spent on the child's care, support and education and the furniture and furnishings, and that she should not say anything about them in her testimony;

"10. * * * that * * * [said] decree of divorce was entered in favor of petitioner which provided that defendant pay in advance to petitioner $300 for one year's support money for the minor child and upon the expiration of a year the sum of $[illegible] was to be paid by defendant to petitioner each month for support of child, and further that petitioner waived all right to alimony, dower, property rights and solicitor's fees;

"11. * * * states that defendant has refused to pay the money, to-wit $1001.00 which she spent for the care, support and education of the minor child, refused to give her the furniture and that although she notified [said] attorney * * *, he has failed to secure the aforesaid things for petitioner as agreed upon;

"12. * * * that because of defendant's fraudulent promises and the ignorance of [said attorney] * * * she was misled, deprived and cheated of her property rights and proper allowance for the care, support and education of the minor child of the parties;

"13. * * * states that all during the marriage of the parties hereto she worked and supported the minor child of the parties hereto and since September 6th, 1927 has been sending said child with the consent of defendant to Bishop Martur Junior Military

school and paying all the tuition, board, room, clothes, doctor and medicine bills amounting to $1081.20;

"14. * * * that defendant is in receipt of a substantial income from his tavern at 3800 South Wallace Street, Chicago, and she is informed and believes such information to be true that he is the owner of the two story building at 6101 South State Street, Chicago, from which he receives $80 a month rent and is well able to reimburse petitioner for money spent on the care, support and education of the minor child of the parties hereto, pay reasonable current support of said child and turn over said furniture to petitioner;

"15. Wherefore, petitioner prays that an order be entered vacating, setting aside and holding for naught and modifying that portion of the decree relating to property rights and support of child and ordering defendant to reimburse petitioner for care, support and education of the minor child in the sum of $1081.20 and that he be compelled to turn over said furniture to plaintiff and pay a reasonable sum as and for support of child, attorneys' fees and such other and further relief as to the court may seem meet."

Defendant was ordered to reply to the petition, and leave was given Attorney Gleason to answer it. Defendant filed the following verified answer:

"1. Defendant states the fact to be that sometime during December, 1938, an agreement was made between plaintiff and defendant, providing that each would waive and release their right and interest, if any, in and to the property of the other, of whatever kind, and that defendant should pay $25 a month to plaintiff for the support of Walter Laita, Jr., child of the parties; that defendant would pay plaintiff $300 for one year's advance for the support of said child. That this agreement was later reduced to writing by William J. Gleason, attorney for plaintiff, is dated January 16, 1939, was signed by the parties hereto; that a copy of said written agreement is hereto attached and marked, 'Defendant's Exhibit 1.'

school and paying all the tuition, board, room, clothes, doctor and medicine bills amounting to $1001.20;

"14. * * * that defendant is in receipt of a substantial income from his tavern at 3800 South Halsted Street, Chicago, and she is informed and believes such information to be true that he is the owner of the two story building at 6101 South State Street, Chicago, from which he receives $80 a month rent and is well able to reimburse petitioner for money spent on the care, support and education of the minor child of the parties hereto. By reasonable current support of said child and turn over said furniture to petitioner;

"15. Therefore, petition prays that an order be entered vacating, setting aside and holding for naught and nullifying that portion of the decree relating to property right and support of child and ordering defendant to reimburse petitioner for care, support and education of the minor child in the sum of $1001.20 and that he be compelled to turn over said furniture to plaintiff and pay a reasonable sum as the for support of child, attorneys' fees and such other and further relief as to the court may seem meet."

Defendant was ordered to reply to the petition and leave was given attorney Hansen to answer it. Defendant filed the following verified answer:

"1. Defendant admits the fact to be true, somewhere during December, 1930, at which time and place between plaintiff and defendant, providing that each should waive and release their right and interest, if any, in and to the property of the other, of whatever kind, and that defendant should pay $15 a month to plaintiff for the support of their infant child, etc., child of the parties; that defendant could pay plaintiff $100 for one year's expense for the support of said child. That this agreement was later reduced to writing by William J. Gleason, attorney for plaintiff, is dated January 1, 1931, was signed by the parties hereto; that a copy of said written agreement is hereto attached and marked, 'Defendant's Exhibit 1.'

"Defendant further alleges that he made no promises or agreements with plaintiff except as are embraced in said written agreement; that said written agreement contains and expresses all promises or agreements between the parties in relation to the settlement of their property rights.

"2. That plaintiff testified in Court at the hearing of her complaint, that a written agreement has been entered into between the parties, and stated that the terms of said agreement were agreeable and satisfactory to her. That after the hearing she was paid the sum of $300, * * * and that a decree of divorce was granted plaintiff and signed by the Court. That the first notice defendant had of plaintiff's change of attitude was when he was served with a copy of plaintiff's petition.

"3. As to the allegations in paragraph 9 of plaintiff's complaint, * * * defendant says these allegations are false and deliberate fabrications; that defendant was not in the presence of plaintiff before the hearing in Court and had no conversation with her or her attorney * * * that day; that he at no time used threats or coercion of any kind toward her with respect to her obtaining a divorce or her acceptance of the agreement made by the parties or in any other way.

"4. Defendant denies that plaintiff paid out the sum of $1081.20 for their child, from September 6th, 1937, and further denies that he promised to pay her this sum or any other sum except that stated in the contract hereinbefore referred to.

"5. Defendant states that the agreement between the parties was made fairly and in good faith by him; that in view of all circumstances involved in the lives of the parties hereto, their conduct, their station in life, their difficulties and differences, the written agreement between them, (defendant's Exhibit 1) was fully as fair to plaintiff as it was to defendant; further that it is not equitable nor in good conscience for plaintiff to enter into the aforesaid agreement, procure the benefits provided for her thereunder, and then without an

"Defendant further alleges that he made no promises or agreements with plaintiff except as are embodied in said written agreement; that said written agreement contains and expresses all promises or agreements between the parties, in relation to the settlement of their property rights.

"5. That plaintiff testified in court at the hearing of her complaint, that a written agreement was entered into between the parties, and stated that the terms of said document were acceptable and satisfactory to her. That after the hearing she was paid the sum of $300, * * * and that a decree of divorce was granted plaintiff and signed by the court. That the first notice defendant had of plaintiff's change of attitude was when he was served with a copy of plaintiff's petition.

"3. As to the allegations in para. graph 3 of plaintiff's complaint, * * * defendant says these allegations are false and deliberate fabrications; that defendant was not in the presence of plaintiff before the hearing in court and has no conversation with her or her attorney * * * that day; that he at no time made threats or coercion of any kind to her and with respect to her obtaining a divorce or her acceptance of the agreement made by the parties or in any other way.

"4. Defendant denies that plaintiff paid out the sum of $1081.40 for their child, from September 20, 1947, and further denies that he promised to pay for this child in any other sum than that stated in the agreement referred to.

"5. Defendant states that the agreement between the parties was made freely and in good faith by him; that in view of all circumstances involved in the life of the parties hereto, their conduct, their station in life, their difficulties and differences, the written agreement between them, (defendant's exhibit 1) was fully as fair to plaintiff as it was to defendant; further that it is not unfair nor in good conscience for plaintiff to enter into the "oral agreement" procure the benefits provided for her thereunder, and then without an

offer to rescind the agreement or to place the parties in the same position they were in before the performance by him of the terms stated, to ask the Court to alter the written agreement between the parties.

"Wherefore, defendant prays that plaintiff's petition be stricken and dismissed; and that defendant have such other and further relief as may seem just and equitable."

Attached to the answer was what purported to be a property settlement, signed by the parties, the material provisions of which are as follows:

"First: The Second Party shall pay to the First Party the sum of Three Hundred Dollars in cash, which sum shall stand as and for advance support money for the minor child of the parties, Walter Laita, Jr., for the period of one (1) year from the date hereof.

"* * *

"Third: That upon the expiration of one year from the date of this agreement the said Second Party shall pay to the said First Party the sum of Twenty Five Dollars a month on the first day of each and every month, said sums to be used by said First Party for the support, maintenance and education of * * * the minor child of the parties.

"Fourth: The parties hereto mutually release each other from any and all claims for alimony, solicitor's fees, and from all interests of every kind, nature and description that they now have or may have in the future in and to any real or personal property owned or acquired by either of them, whether in the nature of dower, homestead or otherwise, or which either of them shall hereinafter possess or control by purchase or inheritance at any and all times whatsoever.

"* * *

"This agreement is intended only for the purpose and shall be construed as having been made and entered into for the purpose of adjusting the property and financial rights of the parties hereto and to dispose of the matter of alimony, dower, solicitor's fees,

offer to receive the agreement of to pay the parties in the same position they were in before the petition of by him of the terms stated, to ask the court to enter the written agreement between the parties.

"Therefore, [illegible] that plaintiff's petition be stricken and dismissed; and that defendant have such other and further relief as may seem just and equitable."

Attached to the answer was the purported to be a property settlement, signed by the parties, the material provisions of which are as follows:

"First: The second party shall pay to the first party the sum of three hundred Dollars in cash, which sum shall stand as and for advance support money for the minor child of the parties, Walter Leila, Jr., for the period of one (1) year from the date hereof.

"* * *

"Third: That upon the expiration of one year from the date of this agreement the said second Party shall pay to the said First Party the sum of twenty five dollars a month on the first day of each and every month, said sum to be used by said First Party for the support, maintenance and education of * * * the minor child of the parties.

"Fourth: The parties hereto mutually release each other from any and all claims for alimony, solid[illegible] fees, and from all interests of every kind, nature [illegible] subject that they now have or may have in the [illegible] of the other's property owned or acquired, either of them, whether in the name of owner, homestead or [illegible], or [illegible] of them shall hereinafter possess or [illegible] as [illegible] and all times whatsoever.

"* * *

"This [illegible] is intended only for the purpose and shall be construed as having been made and entered into for the purpose of adjusting the property and financial rights of the parties hereto and to dispose of the matter of alimony, lower, solicitor's fees,

custody of the minor child of the parties and for his support, and for no other purpose."

Attorney Gleason filed an answer in which he stated that he had no knowledge of the matters and things contained in paragraphs 2 to 7, both inclusive, of the petition. He denied that he ever acted as attorney for defendant and stated that he never knew the parties until they came to his office on December 20, 1938; that he understood they had been referred to him by one of his clients; that he understood from plaintiff that the parties had been separated at different times; that they had agreed upon a property settlement; that defendant had deserted plaintiff for more than one year prior to said consultation without any cause; that he thereupon drew a complaint for a divorce and plaintiff signed it; that he filed the complaint in the cause and represented plaintiff in the proceedings; denies that on January 16, 1939, plaintiff made a protest that the proposed decree did not contain the agreements of the parties, but on the contrary says that no decree was at that time prepared and that the decree was prepared by this attorney days after the hearing on said divorce matter; that plaintiff was fully familiar with the contents of the property settlement agreement; that the parties had reached an oral agreement to the same effect before coming to his office; that he never discussed the property settlement agreement with either of them except to determine what they had agreed upon; that he has no knowledge of the alleged threats and alleged representations made to plaintiff; denies as false and untrue the allegation in paragraph 9 of plaintiff's petition that he ever told plaintiff that he would "see that she got the $300 tavern license money, the money she spent on the child's care, support and education and the furniture and furnishings, and that she should not say anything about them in her testimony;" says that such allegation is a deliberate lie and such conversations were never had with him; that plaintiff fully understood the agreement by her made; that she told him that she understood and agreed to the same and under oath in open court on the day of hearing testified to her understanding of and satisfac-

on the day of hearing, certified to her mental ability of and satisfac-
she understood and agreed to the same and under oath in open court
fully understood the agreement by her made; that she told him that
time and such conversations were never had with him; that plaintiff
about them in her testimony; says that upon cross-examination i. d ibberto
and the furniture [illegible] belongings, and that she knows no any anything
money, the money [illegible] on the child's care, nurture and education
told plaintiff [illegible] "see that the [illegible] 600 [illegible] licenses
the allegation in paragraph 9 of plaintiff's petition that he ever
alleged representations made to [illegible] concerning the care and nature
had agreed upon; that he has no knowledge of the alleged threats and
settlement agreement with either of them except to determine what they
before coming to his office; that he never discussed the property
ment; that the parties had reached an oral agreement to the same effect
was fully familiar with the contents of the property settlement agree-
attorney days after the hearing on the divorce matter; that plaintiff
was at that time prepared and that the decree was prepared by this
the agreements of the parties, but on the contrary says that no decree
on the day of hearing, certified to her mental ability of and satisfac-
she understood and agreed to the same and under oath in open court
fully understood the agreement by her made; that she told him that
time and such conversations were never had with him; that plaintiff
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before coming to his office; that he never discussed the property
ment; that the parties had reached an oral agreement to the same effect
was fully familiar with the contents of the property settlement agree-
attorney days after the hearing on the divorce matter; that plaintiff
was at that time prepared and that the decree was prepared by this
the agreements of the parties, but on the contrary says that no decree
and plaintiff signed by what he filed the complaint in the cause and
represented plaintiff in the proceedings; denies that on January 10,
1939, plaintiff made a protest that the proposed decree did not contain
without any cause; that the thereupon dre[illegible] complaint for a divorce
dessrted plaintiff for more than one year prior to said consultation
that they had agreed upon a property settlement; that defendant had
from plaintiff that the parties had been separated at different times;
they had been referred to him by one of his clients; that he understood
until they came to his of ice on December 20, 1938; that he understood
as attorney for defendant and stated that he never knew the parties
had no knowledge of the matters and things contained in paragraphs 2
to 7, both inclusive, of the petition. He denies that he ever acted
for no other purpose."

Attorney Gleason filed an answer in which he stated that he
custody of the minor child of the parties and for his support, and

tion with the terms thereof. The answer admits the allegations contained in paragraph 10 of the petition; denies that he ever had any conversation with plaintiff in regard to the matters alleged in paragraph 11 of the petition; states that prior to the decree and after payment of the $300 plaintiff called him on the telephone and said she would like to get from defendant a certain oil heater; that he informed her that she had made her own property settlement and was bound thereby and there was nothing he could do for her; that he "denies as false, untrue and slanderous any and all statements that he did anything to mislead, deprive or cheat the plaintiff of her property rights and on the contrary says she was fully, properly and truly advised as to her rights and at all times fully understood her agreement."

Plaintiff's petition and the answers thereto were referred to a special commissioner to take testimony, make findings, and report his findings and recommendations to the court. The order of reference provided: "* * * that the costs of this reference are hereby taxed against the plaintiff." Plaintiff bitterly complains of the action of the trial court in taxing the costs of the reference against her, in advance of the hearing, and although we think the court's action in that regard was not warranted, we do not find that plaintiff made any objection to that part of the order at the time it was entered.

Whether or not the special commissioner was a lawyer does not appear from the record. No transcript of the evidence was filed. The special commissioner made a very short, unsatisfactory summary of the evidence of the witnesses who testified before him. His conclusions and recommendations were as follows:

"A.

"That the agreement that William J. Gleason drew and which the parties signed was the only agreement that they represented to Mr. Gleason they had ever entered into.

"B.

"That Mrs. Laita has actually expended the sum of Eight Hundred Eighty Six Dollars and Seventy Cents for the support of the

tion with the terms thereof. The answer admits the allegations contained in paragraph 10 of the petition; denies that he ever had any conversation with plaintiff in regard to the matters alleged in paragraph 11 of the petition; states that prior to the decree and after payment of the $300 plaintiff called him on the telephone and said she would like to get from defendant certain oil leases; that he informed her that she had made her own property settlement and was bound thereby and there was nothing he could do for her; that he "denies as false, untrue and slanderous any and all statements that he did anything to mislead, deprive or cheat the plaintiff of her property rights and on the contrary says she was fully, properly and truly advised as to her rights and at all times fully understood her agreement."

Plaintiff's petition and the answers thereto were referred to a special commissioner to take testimony, make findings, and report his findings and recommendations to the court. The order of reference provided: "* * * that the scope of the reference herein be taken against the plaintiff." Plaintiff filed a replication of the action of the trial court in holding the scope of the reference against her, in advance of the hearing, and although we think the court's action in that regard was not warranted, we do not find that the plaintiff made any objection to that part of the order at the time it was entered.

Whether or not the special commissioner was a lawyer does not appear from the record. No transcript of the evidence was filed. The special commissioner made a very short, unsatisfactory summary of the evidence of the witnesses who testified before him. His conclusions and recommendations were as follows:

"1.

"That the agreement that William A. Gleason drew and which the parties signed was the only agreement that they represented to Mr. Gleason they had ever entered into.

"2.

"That Mrs. Leila has actually expended the sum of Eight Hundred Eighty Six Dollars and Seventy Cents for the support of the

minor child of the parties hereto. That Mr. Laita has given her Two Hundred Twenty Dollars to apply against that sum. That it would be inequitable for him not to support his child and that he should reimburse her to the extent of Six Hundred Sixty Six Dollars and Seventy Cents for moneys expended.

"C.

"That he should pay her the sum of Fifty Dollars per month for the care, support and maintenance of the minor child of the parties hereto, nunc pro tunc as of March 1, 1939.

"D.

"That there was no basis or reason for Mrs. Laita releasing any claims for dower, alimony and solicitor's fees for the promise of Mr. Laita to support their child. That Mr. Laita was bound by law to support his child and that the Three Hundred Dollars which he gave her for the first year's support was moneys that he had promised her for a tavern license and should be regarded in lieu of alimony, dower, and solicitor's fees.

"RECOMMENDATIONS.

"First: I, therefore, recommend that Walter Laita be ordered and directed to pay to Sophia Laita the sum of Six Hundred Sixty Six Dollars and Seventy Cents, being the balance due her for moneys expended in behalf of * * * the minor child of the parties hereto. That the said sum be paid by Mr. Laita to Mrs. Laita in such amounts as may be determined by the court to be reasonable.

"Second: I also recommend that Walter Laita be ordered and directed to pay to Sophia Laita the sum of Fifty Dollars per month for the support and care of their child * * * said payments to commence as of March 1, 1939, and to be made on the first day of each month thereafter.

"Third: I further recommend that the court find that the sum of Three Hundred Dollars paid by Walter Laita to Sophia Laita was in lieu of and in settlement of all claims for alimony, dower and solicitor's fees.

minor child of the parties hereto. That Mr. Leite has given her Two Hundred Twenty Dollars to apply against that sum. That it would be inequitable for him not to support his child and that he should reimburse her to the extent of Six Hundred Sixty Six Dollars and Seventy Cents for moneys expended.

"C.

"That he should pay for the sum of Fifty Dollars per month for the care, support and maintenance of the minor child of the parties hereto, June 20th as of June 1, 1970.

"D.

"That there was no basis or reason for Mrs. Leite releasing any claims for dower, alimony, and solicitor's fees for the promise of Mr. Leite to support their child. Further, Leite was bound by law to support his child and that the Three Hundred Dollars which he gave her for the first year's support was money that he had promised her for a seven license and should be regarded in lieu of alimony, dower, and solicitor's fees.

"[illegible] Dollars.

"First: I, therefore, recommend that Walter Leite be ordered and directed to pay to Sophia Leite the sum of Six Hundred Sixty Six Dollars and Seventy Cents, being the balance due her for moneys expended in behalf of * * * the minor child of the parties hereto. That the child can be paid by Mr. Leite to Mrs. Leite in such amounts as may be determined by the court to be reasonable.

"Second: I also recommend that Walter Leite be ordered and directed to pay to Sophia Leite the sum of Fifty Dollars per month for the support and care of their child * * * and payment to commence as of March 1, 1970, and to be made on the first day of each month thereafter.

"Third: I further recommend that the court find that the sum of Three Hundred Dollars paid by Walter Leite to Sophia Leite was in lieu of and in settlement of all claims for alimony, dower and solicitor's fees.

"Fourth: I further recommend that the decree heretofore entered on January 31, 1939, be confirmed in all other respects not heretofore noted here."

Both parties filed objections to the report, and thereafter the commissioner filed the following supplemental report:

"(1) I find as a matter of fact that Attorney Gleason drew the written contract set forth in defendant's answer, dated the 16th day of January 1939, as Mr. Laita directed and was never at any time asked by Mrs. Laita to include any provisions for the payment to her of either $300 to buy a tavern license or a certain amount to reimburse her for expenditures previously made by her in educating the minor son.

"(2) * * * that Attorney Gleason acted in perfect good faith, with no knowledge of any extraneous agreements and served his client, Sophia Y. Laita, according to the facts she related to him and to the best of his ability.

"(3) * * * that sometime during preliminary negotiations prior to the execution of the written agreement between the parties and prior to the hearing in the Divorce Court, the husband promised to pay to the wife $300 for the purpose of providing her with the funds necessary to purchase a tavern license.

"(4) * * * that petitioner has expended $886.70 * * * from September, 1937, to January, 1939, for the education and support of their minor child and of this amount $220 was paid to her by defendant.

"(5) * * * that the written agreement did not provide for payment to plaintiff of any sums previously paid by her for child support and education.

"(6) * * * that the oral promise made by defendant to plaintiff to provide her with $300 to purchase a tavern license was at a date prior to the written agreement executed by plaintiff on January 16, 1939.

"(7) * * * that petitioner, Sophia Y. Laita, can read and write the English language, that she had full opportunity to read the contract, that it was signed in the office of William J. Gleason

"Fourth: I further recommend that the decree heretofore entered on January 11, 1939, be confirmed in all other respects not heretofore noted here."

Both parties filed objections to the report, and thereafter the commissioner filed the following supplemental report:

"(1) I find as a matter of fact that attorney Gleason drew the written contract set forth in defendant's answer, dated the 16th day of January 1939, as Mr. Leite directed and was never at any time asked by Mrs. Leite to include any provisions for the payment to her of either $300 to buy a tavern license or a certain amount to reimburse her for expenditures previously made by her in educating the minor son.

"(2) * * * that Attorney Gleason acted in perfect good faith, with no knowledge of any extraneous agreements and served his client, Sophia V. Leite, according to the facts she related to him and to the best of his ability.

"(3) * * * that sometime during preliminary negotiations prior to the execution of the written agreement between the parties and prior to the filing in the Divorce Court, the husband promised to pay to the wife $300 for the purpose of providing her with the funds necessary to purchase a tavern license.

"(4) * * * that petitioner has expended $886.70 * * * from September, 1937, to January, 1939, for the education and support of their minor child and of this amount $420 was paid to her by defendant.

"(5) * * * that the written agreement did not provide for payment to plaintiff of any sums previously paid by her for child support and education.

"(6) * * * that the oral promise made by defendant to plaintiff to provide her with $300 to purchase a tavern license was at a date prior to the written agreement executed by plaintiff on January 16, 1939.

"(7) * * * that petitioner, Sophia V. Leite, can read and write the English language, that she had full opportunity to read the contract, that it was signed in the office of William J. Gleason

in the absence of defendant; that she signed it with full knowledge of its contents.

"(8) * * * that defendant does not operate a tavern at 3800 South Wallace Street and that his only source of revenue at the present time is $80 a month which he derives from a two-story building owned by him at 6101 South State Street; that his interest in said tavern was sold by him in February, 1939.

"(9) * * * that the testimony given upon the hearings before me, regarding the terms of the agreement between plaintiff and defendant, is in direct contradiction to both her testimony, as contained in the written transcript, before the court and the express terms of the written agreement.

"From an examination of the evidence submitted to me and objections filed by attorneys for respondent, I hereby refuse the following findings:

"(1) I find as a matter of fact that the $300 which was paid to petitioner was not pursuant to any oral promise to buy her a license, but was instead pursuant to the written contract as support money for the minor child.

"(2) * * * that the wife never complained either to Mr. Gleason or to her husband that either the $300 license obligation or the alleged promise to reimburse her for funds expended in the education of the son were excluded from the written contract.

"(3) * * * that plaintiff's charge that Walter Laita told petitioner that if she didn't sign said contract her body would be found in the lake, is not supported by the evidence.

"(4) * * * that defendant did not at any time promise to reimburse plaintiff for expenditures she made before the filing of the suit herein for the support and education of the child * * *.

"From an examination of the evidence submitted to me and objections filed by the attorneys for respondent, I hereby conclude as follows:

"(1) I conclude as a matter of law that this matter was referred to me for the sole purpose of determining the issues

in the absence of defendant; that she signed it with full knowledge of its contents.

"(8) * * * that defendant does not operate a tavern at 3800 South Wallace street and that his only source of revenue at the present time is $80 a month which he derives from a two-story building owned by him at 6101 South State street; that his interest in said tavern was sold by him in February, 1939.

"(9) * * * that the testimony given upon the hearings before me, regarding the terms of the agreement between plaintiff and defendant, is in direct contradiction to both for testimony, as contained in the written transcript, before the court and the express terms of the written agreement.

"From an examination of the evidence submitted to me and objections filed by attorneys for respondent, I hereby refuse the following findings:

"(1) I find as a matter of fact that the $300 which was paid to petitioner was not pursuant to any oral promise to buy her a license, but was instead pursuant to the written contract as support money for the minor child.

"(2) * * * that she never complain a either to Mr. Gleason or to him himself that she was the light liquor obligation or the alleged promise to reimburse her for funds expended in the education of the son were excluded from the written contract.

"(3) * * * that Mrs. Jill energy that either latter told petitioner that if she [illegible] in court of her story would be found in the light, is not supported by the evidence.

"(4) * * * that defendant did not at any time promise to reimburse plaintiff for expenditures she made before the filing of the suit herein for the support and education of the child * * *.

"From an examination of the evidence submitted to me and objections filed by the attorneys for respondent, I hereby conclude as follows:

"(1) I conclude as a matter of law that this matter was referred to me for the sole purpose of determining the issues

presented by the petition to amend the decree and the answer filed thereto.

"(2) * * * that the allegation in the petition 'Your petitioner further states that because of the defendant's fraudulent promises and the assurances of William J. Gleason whom he secured to act as her attorney, she was misled, deprived and cheated of her property rights and proper allowance for the care, support and education of the minor child of the parties;' is unsupported by the evidence.

"(3) * * * that where plaintiff has impeached her own testimony by testifying one way before the court and another way before me as Special Commissioner that such a variance should be considered in weighing the credibility of the witness.

"From an examination of the evidence submitted to me and objections filed by the attorneys for respondent, I hereby refuse the following conclusions of law:

"(1) I conclude as a matter of law, based upon the findings of fact on connection herewith that the husband and wife entered into a certain written contract dated January 16, 1939, as set forth in the answer of Walter Laita and that no fraud, coercion, misrepresentation or unfair advantage was practiced by defendant to induce plaintiff to enter into said contract.

"(2) * * * that the preliminary oral promise to give plaintiff $300 for a tavern license was abrogated by the subsequent written agreement.

"(3) * * * that where the court, having heard plaintiff's testimony and having knowledge of the facts approved the terms of the written agreement, I have no right to recommend the substitution of a different agreement than the one executed by the parties, merely because I believe such agreement to be inequitable.

"(4) * * * that the decree for divorce heretofore entered by the Court and especially that portion relating to property rights should remain in status quo.

"I further conclude that some time prior to the date that

presented by the petition to amend the decree and the answer filed thereto.

"(2) * * * that the allegation in the petition 'Your petitioner further states that because of the defendant's fraudulent promises and the assurances of William C. Gibson upon he secured to act as her attorney, she was misled, deprived and cheated of her property rights and proper allowance for her own support and education of the minor child of the parties;' is unsupported by the evidence.

"(3) * * * that where plain it has impeached her own testimony by testifying one way before the court and another way before me as Special Commissioner, that such a variance should be considered in weighing the credibility of the witness.

"Upon an examination of the evidence submitted to me and objections filed by the attorneys for respondent, I do hereby refuse the following conclusions of law:

"(1) I conclude as a matter of law, based upon the findings of fact on consideration herewith that the husband and wife entered into a certain written contract dated January 1, 1939, as set forth in the answer of Walter Lutz in that no fraud, coercion, misrepresentation or unfair advantage was practiced by respondent to induce plaintiff to enter into said contract.

"(2) * * * that the preliminary oral promise to give plaintiff $300 for a tavern license was merged by the subsequent written agreement.

"(3) * * * that where the court, having heard plaintiff's testimony and having the benefit of the facts approved the terms of the written agreement, I have no right to recommend an abrogation of a different agreement than the one executed by the parties, merely because I believe such agreement to be inequitable.

"(4) * * * that the decree for divorce heretofore entered by the Court and especially that portion relating to property rights should remain in effect and."

"I further conclude that some time prior to the date that

Mr. and Mrs. Laita visited the office of Mr. Gleason, they had entered into an agreement to settle their property rights. That said agreement was different to the written agreement which they eventually signed. However, it was never their intention that the written agreement should supersede their verbal agreement.

"The Special Commissioner has considered the other objections heretofore filed by petitioner and respondent and amends the same and files the said objections with this report."

Thereafter the trial court entered an order allowing defendant's objections to stand as exceptions and allowed defendant to file the following motion:

" * * * defendant * * * moves the Court to dismiss the aforesaid petition of Sophia Y. Laita, upon the following grounds:

"1. That the decree herein, respecting custody of the child, the amount to be paid by defendant for child's support, waiver of alimony and waiver of dower and other property rights or claims, was entered by agreement between the parties, and those portions of the decree constitute a consent decree. As such consent decree in these particulars, plaintiff [defendant] contends that the decree is not subject to review, rehearing or modification in this cause by petition of either party, or otherwise, but that the decree and the agreement of the parties can only be attacked by an original bill in equity in the nature of a bill of review, upon such allegations and proof as would justify setting aside the decree herein, or the written agreement entered into by and between the parties.

"2. That entirely aside from the fact as contended by defendant, that this Court cannot modify the decree herein or alter or vacate the written contract of the parties hereto upon the petition of plaintiff herein, it appears from the report of John J. Devery, Special Commissioner, that plaintiff's allegations of fraud are unsupported by the evidence; that she executed a certain written agreement, the terms of which were mentioned in the decree herein, that she testified in open Court that this agreement was the agreement which she had execute , and that it was satisfactory to her; that the Special Commissioner's report

Mr. and Mrs. Lattz visited the office of Mr. Gibson, they had entered into an agreement to settle their property rights. That agreement was different to the written agreement which they eventually signed. However, it was never their intention that the written agreement should supersede their verbal agreement.

"The Special Commissioner has considered the other objections heretofore filed by petitioner and by permission are amended, the same and files the said objections with this report."

Thereafter the trial court entered an order allowing petitioner's objections to stand as exceptions and allowed petitioner to file the following motion:

" * * * defendant * * * moves the Court to dismiss the petition said petition of Sophia L. Lattz, upon the following grounds:

"1. That the decree herein, respecting custody of the child, the amount to be paid by defendant for child's support, waiver of alimony and waiver of dower and other property rights or claims, was ordered by agreement between the parties, and those portions of the decree constitute a consent decree. As such [illegible] in these particulars, pursuant [illegible] subject to review, modification or [illegible] by petition of either party, or otherwise, by the [illegible] and the agreement of the parties can only be [illegible] by an [illegible] in the nature of a bill of review, upon [illegible] as could justify setting aside a consent decree, or the [illegible] into by and before a [illegible].

"2. [illegible] from [illegible] by defendant, that the [illegible] the decree [illegible] the written contract of the parties [illegible] forth, [illegible] from the report of [illegible], [illegible] er, that [illegible] of [illegible] dence; that the [illegible] which were mentioned in the decree herein, and [illegible] Court that this [illegible] was the [illegible] that it was [illegible] story to her; that the [illegible] report

herein finds that she signed said agreement with full knowledge of its contents."

It will be noted that defendant's answer to plaintiff's petition contested the petition solely upon the merits and that it was not until a report, adverse to him, was filed that the point was raised by him that the decree, in so far as it affected the property rights, etc., of the parties, could only be attacked by an original bill in equity in the nature of a bill of review. It is clear that the point was an afterthought.

Plaintiff thereupon filed a petition for a change of venue from the trial court, which petition was denied. The trial court then, upon motion of defendant, entered the following order:

"This cause coming on to be heard upon exceptions to the Report of the Special Commissioner and the motion of defendant to dismiss the plaintiff's petition to vacate and modify the decree herein; the parties being represented by counsel who are present in court, and the court heretofore having heard the arguments of counsel and being advised in the premises and having jurisdiction of the parties and of the subject matter;

"It is ordered, adjudged and decreed that the defendant's exceptions to the Special Commissioner's Report are sustained; and the petition of plaintiff to vacate and modify the decree heretofore entered herein be and it is hereby overruled and dismissed * * *."

Plaintiff contends that "the court erred in sustaining the defendant's motion to dismiss;" that "the court erred in sustaining the defendant's exceptions to the Commissioner's report;" and "the court erred in failing to confirm the Commissioner's report and enter a decree in accordance therewith."

As we have heretofore stated, the evidence heard by the special commissioner was not preserved by a transcript of the evidence, and the only knowledge the trial court had as to the facts he gained from the report. It is stated that a transcript of the evidence would take up 400 or 500 typewritten pages. The special commissioner's

herein finds that she signed said agreement with full knowledge of its contents."

It will be noted that defendant's answer to plaintiff's petition contested the petition solely upon the merits and that it was not until a report, adverse to him, was filed that the point was raised by him that the decree, in so far as it affected the property rights, etc., of the parties, could only be authorized by an original bill in equity in the nature of a bill of review. It is clear that the point was an afterthought.

Plaintiff thereupon filed a petition for a change of venue from the trial court, which petition was denied. The trial court then, upon motion of defendant, entered the following order:

"This cause coming on to be heard upon exceptions to the report of the Special Commissioner and the motion of defendant to dismiss the plaintiff's petition to vacate and modify the decree herein; the parties being represented by counsel who are present in court, and the court heretofore having heard the arguments of counsel and being advised in the premises and having jurisdiction of the parties and of the subject matter;

"It is ordered, adjudged and decreed that the defendant's exceptions to the Special Commissioner's report are sustained; and the petition of plaintiff to vacate and modify the decree heretofore entered herein be and it is hereby overruled and dismissed. * * *."

Plaintiff contends that "the court erred in sustaining the defendant's motion to dismiss;" that "the court erred in sustaining the defendant's exceptions to the commissioner's report;" and "the court erred in failing to confirm the Commissioner's report and enter a decree in accordance therewith."

As we have heretofore stated, the evidence heard by the special commissioner was not preserved by a transcript of the evidence, and the only knowledge the trial court had as to the facts he gained from the report. It is stated that a transcript of the evidence would take up 400 or 500 typewritten pages. The special commissioner's

summary of the evidence and his comments upon the same take up less than five typewritten pages. The dismissal of the petition cannot be justified upon the summary of the evidence filed by the commissioner, nor upon his findings and conclusions. It is evident that the action of the trial court in entering the order appealed from was based upon the theory of law advanced by defendant in his motion to dismiss the petition of plaintiff, viz., that "the decree and the agreement of the parties can only be attacked by an original bill in equity in the nature of a bill of review." Defendant states in his brief: "It was the position of the defendant in the court below and it is his position here that the decree, in so far as it related to the custody and support of the child and the property rights of the parties, was a consent decree and could only be modified by an original bill in the nature of a bill of review." In the instant case the decree was entered on January 31, 1939, and plaintiff's petition was filed twenty-seven days thereafter. The statute provides (Ill. Rev. Stat. 1939, ch. 110, par. 174, sec. 50): "(7) The court * * * may within thirty days after the entry thereof set aside any judgment or decree upon good cause shown by affidavit, upon such terms and conditions as shall be reasonable." The instant petition was filed while the trial court still had full control of the decree. Defendant contends that the statute does not apply to that part of the instant decree that relates to alimony, attorney's fees, dower, homestead and property rights. This contention is without merit and the cases cited in support of it do not apply. In Smith v. Smith, 334 Ill. 370, - the leading case cited by defendant in support of his position - the decree of divorce recited that the parties "reached an agreement regarding the question of alimony and the adjustment of property rights between them," and it was decreed that the defendant do certain things, in accordance with the agreement. The decree was entered on October 3, 1922, and on July 21, 1926, the complainant filed a petition for a modification of the decree, alleging fraud in procuring her agreement to the consent decree. The Supreme court held that the consent part of the decree

summary of the evidence and his comments upon the same take up less than five typewritten pages. The dismissal of the petition cannot be justified upon the summary of the evidence filed by the commissioner, nor upon his findings and conclusions. It is evident that the action of the trial court in entering the order appealed from was based upon the theory of law advanced by defendant in his motion to dismiss the petition of plaintiff, viz., that "the decree and the agreement of the parties can only be attacked by an original bill in equity in the nature of a bill of review." Defendant states in his brief: "It was the position of the defendant in the court below and it is his position here that the decree, in so far as it related to the custody and support of the child and the property rights of the parties, was a consent decree and could only be modified by an original bill in the nature of a bill of review." In the instant case the decree was entered on January 31, 1939, and plaintiff's petition was filed twenty-seven days thereafter. The statute provides (Ill. Rev. Stat. 1939, ch. 110, par. 174, sec. 20): "(7) The court * * * may within thirty days after the entry thereof set aside any judgment or decree upon good cause shown by affidavit, upon such terms and conditions as shall be reasonable." The instant petition was filed while the trial court still had full control of the decree. Defendant contends that the statute does not apply to that part of the instant decree that relates to alimony, attorney's fees, costs, homestead and property rights. This contention is without merit and the cases cited in support of it do not apply. In Smith v. Smith, 344 Ill. 177, - the leading case cited by defendant in support of his position - the decree of divorce recited that the parties "entered an agreement respecting the question of alimony and the adjustment of property rights between them," and it was decreed that the contract do satisfy liability, in accordance with the agreement. The decree was entered on October 1, 1926, and on July 21, 1926, the complainant filed a petition for a modification of the decree, alleging fraud in procuring her agreement to the consent decree. The Supreme Court held that the consent part of the decree

was binding on the parties unless induced by fraud, but that if the consent decree was procured by fraud the petition for a modification of the decree was not the proper method to obtain relief in that proceeding. That case has no application to the instant petition, which was filed within the time that the trial court had full jurisdiction to vacate or modify the decree. King v. King, 290 Ill. App. 160 (decided by this division of the court), has no application to the question before us. The same may be said as to several other cases cited by defendant.

The trial court erred in sustaining defendant's exceptions to the commissioner's report and in dismissing the petition for want of equity. The decree of the Superior court of Cook county is reversed, and, because of the unsatisfactory, inconsistent nature of the special commissioner's report and the lack of a transcript of the evidence, the cause is remanded for a new trial of plaintiff's petition. We see no good reason why the trial court should not hear the evidence and determine the merits of the petition.

DECREE REVERSED AND CAUSE REMANDED
FOR A NEW TRIAL OF PLAINTIFF'S PETITION.

Friend, P. J., and Sullivan, J., concur.

was binding on the parties unless induced by fraud, nor does if the consent decree was procured by fraud or collusion or a modification of the decree was not the proper method to obtain relief in that proceeding. That is not an application to the instant petitioner, which was filed within the time for the taking of an appeal from a direction to vacate or modify the decree. Hunt v. Hun, 90 Ill. App. 160 (decided by the 1st division of the court), is no application to the question before us. The case may be held to be several other cases cited by defendant.

The trial court [illegible] to the complainant's [illegible] of equity. The decree of the lower court of [illegible] reversed, and the case of the [illegible] of the [illegible] of the validity [illegible] petition. [illegible] not [illegible] the validity [illegible] of the petition.

[illegible]

Reversed, [illegible] remanded.

40232

THE PEOPLE OF THE STATE OF ILLINOIS, ex rel. EDWARD J. BARRETT, Auditor of Public Accounts,

Appellee,

v.

DEPOSITORS STATE BANK, a corporation.

HELEN SCHYMANSKI,

Appellant,

v.

CHARLES H. ALBERS, Receiver of Depositors State Bank, a corporation.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

306 I.A. 277

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Helen Schymanski filed an intervening petition in this cause, People ex rel. Edward J. Barrett, Auditor of Public Accounts, v. Depositors State Bank, wherein she prayed that she be decreed a special and preferred claim against the assets of said bank in the hands of Charles H. Albers, the receiver thereof (hereinafter for convenience sometimes referred to as the respondent), said claim being for $30,918.18, alleged to be the balance of a condemnation award of $93,535 theretofore paid to petitioner and deposited by her in the Depositors State Bank in a special deposit for certain specific purposes. The cause was referred to a master in chancery for hearing on said intervening petition and the answer of the receiver thereto. On the final hearing before the chancellor a decree was entered in accordance with the recommendation of the master, dismissing the intervening petition for want of equity, for laches and for failure to file same within the time limited by court order. From the foregoing decree this appeal is prosecuted by the intervening petitioner.

For a clearer understanding of the issues involved it is necessary that the facts be fully set forth. On March 3, 1924, the Depositors State Bank (hereinafter for convenience sometimes referred to as the bank) and one Edward B. Becker, on behalf of his mother,

THE PEOPLE OF THE STATE OF NEW YORK,
ex rel. EDWARD J. [illegible], Commissioner
of Public Accounts,

Appellant,

v.

DEPOSITORS TRUST COMPANY, a corporation,

Respondent.

HERBERT SCHMALZ,

Appellant,

v.

CHARLES H. [illegible], Superintendent of
Depositors [illegible] Bank, a corporation,

Respondent.

MR. JUSTICE [illegible] delivered the opinion of the Court.

Upon substantial files in two [illegible] proceedings in this case, People ex rel. [illegible] v. [illegible], Superintendent of Public Accounts, v. Depositors State Bank, [illegible] the Bank, [illegible] and preferred claims [illegible] the assets of said bank in the hands of Charles H. [illegible], [illegible] liquidator (hereinafter for convenience sometimes referred to as the "Superintendent"), [illegible] claims [illegible] for [illegible] in a special [illegible] proceedings [illegible] referred to [illegible] and the [illegible] conclusion [illegible] the matter, [illegible] order. From [illegible] in controversing [illegible].

For a clearer understanding of the issues involved in the [illegible] necessary that [illegible] be fully set forth. [illegible], 1929, the Depositors [illegible] to be the [illegible] and [illegible] Bank, [illegible]

Depositors State Bank

Helen Schymanski, entered into a written contract whereby the bank agreed to sell for $130,000 and Becker agreed to buy at that price certain premises owned by the bank on South Ashland avenue, Chicago. The purchaser paid $10,000 as earnest money upon the signing of the contract and agreed to pay the further sum of $20,000 upon delivery of a warranty deed to the premises within five days after the title had been found good. The $100,000 balance was to be paid "at the rate of $5,000 per year, second, third, fourth, fifth and sixth years, and the balance in seven years from date of delivery of Warranty Deed." The contract further provided as follows:

"It is however understood and agreed that as soon as the purchaser collects the award from the City of Chicago for taking and condemning a portion of said premises, said purchaser shall pay out of said award within ten (10) days after receiving the award the sum of Thirty-five Thousand ($35,000) Dollars, an agreement to that effect shall be inserted in the Trust Deed securing bonds of $100,000 ***.

"At the time of the execution of the Warranty Deed, the Depositors State Bank shall execute a written authority, authorizing the purchaser to collect from the City of Chicago the award allowed for taking and condemning a portion of said premises and the purchaser agrees to pay out of said award Ten Thousand ($10,000) Dollars to the Attorneys now conducting said suit, said purchaser shall also pay out of said award to the Depositors State Bank the sum of Thirty Five Thousand ($35,000) Dollars to apply on account of the bonds given to secure part purchase price as above provided, and the balance after deduction of all assessments shall be and become the property of the purchaser."

Thereafter, on March 13, 1924, the parties entered into another written agreement, which after reciting that they had on March 3, 1924, entered into a certain contract whereby the seller agreed to sell and the purchaser agreed to purchase the property in question, provided in part as follows:

"It is the expectation of said parties that the City of Chicago will condemn and take ten (10) feet off the front of the lots described in said contract for the widening of Ashland Avenue and will pay therefor an award of Seventy Thousand ($70,000) Dollars or more.

"It Is Understood and Agreed by and between said parties that Seventy Thousand Dollars ($70,000) of said award, if it shall amount to Seventy Thousand ($70,000) or more, shall be and become the absolute property of the Purchaser, regardless of whom it shall be awarded to by the judgment of the Court in the condemnation proceedings now pending therefor, and that the balance of said award of Seventy Thousand ($70,000) Dollars or more, shall be and become the absolute property of the seller.

"That the Purchaser shall pay out of his share of said award,

Helen Schuyler, [illegible] entitled contract whereby the park agreed to sell for $130,000 to Benjamin [illegible] to buy a [illegible] certain premises owned by [illegible] on South Michigan Avenue, Chicago. The purchaser paid $10,000 as earnest money upon the signing of the contract and agreed to pay the further sum of $[illegible] upon delivery of a warranty deed to the premises within five days after the title had been found good. The [illegible] contract [illegible] "at the rate of $5,000 per year, second, third, fourth, fifth and sixth years, and the balance in [illegible] payments [illegible] of delivery of Warranty Deed." The contract further provides as follows:

"It is however understood and agreed that [illegible] purchaser collects the rents from the [illegible] and condemning a portion of said premises, [illegible] out of said rents within ten (10) days after [illegible] the sum of Twenty-Five Thousand ($25,000) Dollars, on account to that effect shall be [illegible] of $100,000 ***.

"At the time of the execution of the warranty deed, the Depositors [illegible] shall [illegible] the purchaser to collect from the City of Chicago [illegible] for taking and condemning a portion of said premises [illegible] chaser agrees to pay [illegible] to the Attorneys [illegible] pay out of said award to the Depositors [illegible] Twenty Five Thousand ($25,000) Dollars to satisfy [illegible] bonds given [illegible] balance after [illegible] property of the parties."

Thereafter, [illegible] 1[illegible], 1[illegible], the park [illegible] entitled "[illegible]" [illegible] entered into a [illegible] the purchaser [illegible] part as follows:

"It is [illegible] Chicago will [illegible] described in said [illegible] pay therefor [illegible]

"It is [illegible] seventy thousand ($70,000) [illegible] seventy thousand ($[illegible]) or more, [illegible] property of the [illegible] the judgment of [illegible] therefore, [illegible] ($70,000) Dollars or more, shall be [illegible] of the seller.

"That the purchaser shall [illegible]

if same amounts to Seventy Thousand ($70,000) Dollars or more, Ten Thousand ($10,000) Dollars as attorneys' fees, and shall assume the special assessment levied against the premises up to Six Thousand ($6,000) Dollars only, any special assessments in excess of Six Thousand ($6,000) Dollars to be borne by the Seller.

"If said award shall amount to Seventy Thousand ($70,000) Dollars or more, then Thirty-five Thousand ($35,000) Dollars of the share of the Purchaser shall be used to pay off, take up and cancel bonds or notes evidencing the deferred payments provided for in said contract of March 3, 1924, the bonds to be paid off, taken up and cancelled to be selected by the Purchaser.

"If said award shall amount to Seventy Thousand ($70,000) Dollars or less, the Seller shall have no interest therein and the attorneys' fees to be paid by the Purchaser will be one-seventh (1/7) of the amount of said award and the amount to be applied upon said deferred payments shall be one-half (1/2) only of the amount of said award ***."

On May 1, 1924, petitioner made the additional payment of $20,000 provided for in the original contract of purchase and received a warranty deed for the premises, which provided inter alia that she had "the right and title to all compensation or remuneration which may become due from the City of Chicago for the taking of the West ten (10) feet of said Lots." On the same date petitioner executed and delivered to the bank her trust deed conveying the premises to Julius F. Smietanka, as trustee, to secure the payment of her bonds of even date in the aggregate sum of $100,000, the balance of the purchase price.

On May 13, 1924, the petitioner and the bank executed the following further written agreement:

"This Memorandum made and entered into this 13th day of May, A. D. 1924, by and between Depositors State Bank, a corporation organized and doing business under and by virtue of the laws of the State of Illinois, and Helen Schymanski, of Chicago, Cook County, Illinois.

"Witnesseth as follows:

"Whereas said Edwin B. Becker did, on March 3, 1924, enter into a certain contract with said Depositors State Bank for the purchase of certain property described therein, situated in the City of Chicago, and

"Whereas said Edwin B. Becker did, on March 13, 1924, enter into a supplemental contract with reference thereto with said Depositors State Bank, and

"Whereas said Edwin B. Becker was, in the making of said contracts, acting in behalf of said Helen Schymanski,

if same amounts to several thousand (5,000) dollars or more, then Thousand ($10,000) Dollars to the employee' [illegible] the special assessment levied against the premises up to six thousand ($6,000) Dollars and, any sum if it is in excess of six Thousand ($6,000) Dollars to be borne by the Seller.

"If said sewer small amount to seventy thousand ($70,000) Dollars or more, then Twenty-five thousand ($25,000) Dollars of the share of the Purchaser shall be used to pay off, take up and cancel bonds or notes evidencing the deferred payments provided for in said contract of March 1, 1924, the bonds to be paid off, taken up and cancelled to be selected by the Trustee."

"If said sewer small amount to seventy thousand ($70,000) Dollars or less, the Seller shall have the Purchaser execute and the attorneys' fees to be paid by the Purchaser [illegible] (1/7) of the amount of said award and [illegible] be applied upon said deferred payments [illegible] of said award ***."

On May 1, 1924, both forms have the additional payment of $20,000 provided for in the original contract of purchase and received a warranty deed for the premises, which provided [illegible] that the had "the right and title to [illegible] which may become due from the City of Chicago for [illegible] of the [illegible] ten (10) feet of said lots." [illegible] and delivered to [illegible] the premises to Julius V. [illegible] to transfer, [illegible] payment of her [illegible] of even date in the [illegible] of $[illegible], the balance of the purchase price.

On May 1, 1924, the [illegible] which contained the following further [illegible]:

"This agreement [illegible] May, A. D. 1924, [illegible] organized and [illegible] the State of Illinois [illegible] Illinois.

"[illegible] follows:

"Whereas [illegible] into a certain contract [illegible] purchase of property [illegible] City of Chicago, and

"Whereas [illegible] into a supplemental contract [illegible] depositors [illegible] and

"Whereas said [illegible] contracts, [illegible]

Now, Therefore, said contract and supplemental contract having been partially performed, it is understood and agreed by and between said parties as follows:

"1. That said Depositors State Bank has on its part fully performed said contract and supplemental contract by executing and delivering to said Helen Schymanski a Warranty Deed to the premises described therein in conformity with said contract and supplemental contract, and

"2. That said Helen Schymanski has partially performed said contract and supplemental contract by making payment of Thirty Thousand ($30,000) Dollars of the purchase price of said premises described therein and by executing and delivering certain bonds in the aggregate sum of One Hundred Thousand ($100,000) Dollars and a Purchase Money Trust Deed securing the same, in accordance with the terms of said contract and supplemental contract.

"It is further understood and agreed that said contract and supplemental contract has, by each of the parties thereto, been fully and completely performed, except so far as the same relates to a certain award of compensation or remuneration for the taking of the West ten (10) feet of Lots Twenty Nine (29) and Thirty (30) in Block Five (5) in S. E. Gross' Subdivision of the South West Quarter (S. W. 1/4) of the South West Quarter (S. W. 1/4) of Section Five (5) Township Thirty Eight (38) North, Range Fourteen (14) by the City of Chicago for the widening of Ashland Avenue, by condemnation or otherwise.

"Now, therefore, it is further understood and agreed by and between said parties as follows:

"1. That when said Helen Schymanski shall receive from the City of Chicago compensation or remuneration for the taking of the West ten (10) feet of said Lots Twenty Nine (29) and Thirty (30), if said compensation or remuneration exceeds the sum of Seventy Thousand ($70,000) Dollars, she will, within ten (10) days after the receipt of such compensation or remuneration, pay over to said Depositors State Bank all of said compensation or remuneration received by her in excess of Seventy Thousand ($70,000) Dollars and if said compensation or remuneration equals or exceeds Seventy Thousand ($70,000) Dollars she will pay Ten Thousand ($10,000) Dollars thereof as attorneys' fees to the attorneys representing the owners of said premises in the condemnation proceeding now pending with reference thereto for the taking of the West ten (10) feet of said Lots Twenty Nine (29) and Thirty (30).

"It is further understood and agreed by and between said parties that if the compensation or remuneration received by said Helen Schymanski shall be less than Seventy Thousand ($70,000) Dollars, then said Depositors State Bank shall have no interest therein and the attorneys' fees to be paid by said Helen Schymanski shall be One Seventh (1/7) only of the amount of said compensation or remuneration so received by her.

"It is further understood and agreed by and between said parties that all special assessments levied against the premises described in said contract and supplemental contract, for the taking of the West ten (10) feet of said Lots Twenty Nine (29) and Thirty (30) in excess of Six Thousand ($6,000) Dollars shall be paid by said Depositors State Bank; that is to say, said Helen Schymanski only assumes said special assessments up to the amount of Six Thousand ($6,000) Dollars."

On July 17, 1930, the bank and Mrs. Schymanski entered into

Now, therefore, said [illegible] and legal [illegible] contract, having been partially performed, it is the [illegible] agreed by and between said parties [illegible] follows:

"1. That said [illegible] on its part fully performed said contract and [illegible] by delivering to said [illegible] copyrights [illegible] described therein in conformity with said [illegible] contract, and

"2. That said [illegible] performed [illegible] said contract and [illegible] Thousand ($25,000) Dollars of [illegible] described therein and by [illegible] certain bonds in the aggregate [illegible] Thousand ($25,000) Dollars and a Purchase Money [illegible] said [illegible] and [illegible] terms of said contract [illegible].

"It is further understood and agreed that said contract and supplemental contract [illegible] been fully and completely performed, [illegible] certain award of copyrights [illegible] Nest ten (10) [illegible] Five (5) in B. Grosse [illegible] 1/4) of the total [illegible] Twenty Eight ($28) [illegible] Thirty Eight ($38) [illegible] for the validity of [illegible] or otherwise.

"Now, that for [illegible] between said parties as follows:

"1. That when said [illegible] City of Chicago [illegible] Nest ten (10) [illegible] Thousand ($25,000) Dollars [illegible] the receipt of a [illegible] Depositors [illegible] received by [illegible] said copyright [illegible] Thousand ($25,000) [illegible] Twenty nine ($29) [illegible]

"It is further [illegible] that if the [illegible] copyrights [illegible] said [illegible] then said [illegible] attorneys' fees [illegible] Seventh (1/7) [illegible] so received by [illegible]

"It is further [illegible] parties [illegible] described in [illegible] of the [illegible] Nest ten (10) [illegible] (30) in excess of the [illegible] said [illegible] only assume said [illegible] Twenty [illegible] ($6,000) Dollars."

On July 17, 1[illegible], the bank and Mr. [illegible] entered into

another written agreement, the pertinent portions of which are as follows:

"Whereas, on or about May 1st, 1924, said Schymanski purchased from said Bank the following described premises *** [description follows] and did, on May 1st, 1924, execute and deliver to said Bank her promissory notes aggregating One Hundred Thousand ($100,000) Dollars, secured by a trust deed to Julius F. Smietanka, Trustee, evidencing part of the purchase price of said premises, and

"Whereas, disputes and differences have arisen between said Bank and said Schymanski over the question of whether or not said Schymanski should pay interest on said indebtedness at the rate provided in said notes and trust deed, notwithstanding the terms thereof, by reason of a delay of over six years in the taking of the west ten (10) feet of Lots Twenty-nine (29) and Thirty (30) of said premises for the widening of South Ashland Avenue by the City of Chicago by condemnation proceedings pending at the time of said purchase and which, it was expected would be concluded shortly thereafter, and

"Whereas, said condemnation proceedings have now been completed and the City of Chicago is ready to pay to said Schymanski the owner of said premises, an award amounting to Ninety-nine Thousand and Five Hundred and Twenty-seven Dollars ($99,527) upon receipt of a deed to said West ten (10) feet of said Lots Twenty-nine (29) and Thirty (30) and a release of said trust deed, and

"Whereas, there is a special assessment against Lots twenty-one (21), twenty-nine (29) and thirty (30) of said premises amounting to Five Thousand Nine Hundred Ninety-two Dollars ($5,992) which will be deducted from the amount of said award by the City of Chicago thereby reducing the amount thereof actually collectable by said Schymanski to Ninety-three Thousand and Five Hundred Thirty-five Dollars ($93,535), and

"Whereas, the City of Chicago will only draw its voucher for said award in favor of said Schymanski as the owner of said premises,

"Whereas, it is provided in certain contracts between said parties that said Schymanski shall pay out of said award the sum of Thirty-five Thousand Dollars ($35,000) to apply upon the principal of her said indebtedness, evidenced by her said promissory notes hereinbefore described, and

"Whereas, said Bank is willing to accept Twenty-five Thousand Dollars ($25,000) to apply on the principal of said indebtedness and to reduce the rate of interest on said indebtedness to three (3%) per cent per annum simple interest.

"Now, therefore, in consideration of the premises and the payment by each of said parties to the other of the sum of Ten Dollars ($10), the receipt whereof is hereby acknowledged, all of which disputes and differences are hereby adjusted, compromised and settled, and it is agreed:

"First:..That the suit now pending in the Circuit Court of Cook County for the foreclosure of said trust deed shall be dismissed without costs, costs paid, and without solicitors' fees or expense of any kind to said Schymanski, and that the solicitors of record for the complainant and defendant shall forthwith execute

another written agreement, the [illegible] condition of which is as follows:

"Whereas, on or about July 1st, 19[illegible], said Schwarzenbach purchased from said Bank the following described premises [illegible] [described] tion follows] and said, on July 1st, 19[illegible], executive and delivered to said Bank his promissory note [illegible] the amount of Thousand ($100,000) Dollars, secured by a mortgage lien to trustees, Schwarzenbach, Trustee, evidencing part of the purchase price of said premises, and

"Whereas, disputes and differences have arisen between said Bank and said Schwarzenbach over the question of whether or not said Schwarzenbach should pay interest on said Schwarzenbach at the rate provided in said note and said trust deed, notwithstanding the terms thereof, by reason of a delay of over six years in the taking of the west ten (10) feet of the Schwarzenbach (2) and thirty (30) of said premises for the widening of North Sheridan avenue by the City of Chicago by condemnation proceedings pending at the time of said purchase and which, if [illegible] expected would be consummated shortly thereafter, and

"Whereas, said condemnation proceedings have not been completed and the City of Chicago is ready to pay to said Schwarzenbach the owner of said premises, as award monetary to Ninety-Nine Thousand and Five Hundred Twenty-seven Dollars ($99,527) upon receipt of a deed to said [illegible] feet of said lot Schwarzenbach (29) and Thirty (30) and a release of said trust deed, and

"Whereas, there is a special [illegible] trust note [illegible] twenty-one (21) [illegible] the [illegible] (10) of said premises amounting to Five Hundred [illegible] Dollars ($5,000) which will be [illegible] from the award of a [illegible] by the City of Chicago [illegible] to [illegible] Thousand and Five Hundred Twenty-five Dollars ($99,525), and

"Whereas, the City of Chicago will only draw its warrant for said award in favor of said Schwarzenbach as the owner of said premises,

"Whereas, it is provided in certain contracts between said parties that [illegible] payment of [illegible] of the sum of Thirty-five Thousand Dollars ([illegible]) [illegible] the [illegible] of not exceeding [illegible] Thousand Dollars ([illegible]) [illegible] said [illegible] indebtedness [illegible] to three ([illegible]) [illegible] interest,

"Now, [illegible] in consideration of the [illegible] and the payment by [illegible] to the order of the [illegible] Thousand Dollars ([illegible]) [illegible] of which is [illegible] [illegible] and [illegible] any section [illegible] [illegible]:

"First: [illegible] City of Chicago [illegible] court of Cook County for [illegible] of said [illegible] [illegible] misses without [illegible] said [illegible] and without [illegible] or expense [illegible] said Schwarzenbach, [illegible] of [illegible] for [illegible] and [illegible] [illegible]

and deliver to said Schymanski a stipulation providing for the dismissal of said suit in accordance herewith.

"Second:..That said Bank shall release from the lien of said trust deed the west ten (10) feet of Lots Twenty-nine (29) and Thirty (30) of said premises upon receipt of the voucher of the City of Chicago for the net amount of said award properly endorsed by said Helen Schymanski.

"Third:..That said bank, immediately upon receiving said voucher so endorsed, shall deduct therefrom and apply in partial payment of the principal of said indebtedness to it, of said Schymanski, the sum of Twenty-five Thousand ($25,000) Dollars; and shall also deduct a sum equal to the difference between the interest at three (3%) per cent per annum simple interest on said indebtedness from May 1st, 1924 to the date of the collection of said award and Eight Thousand Five Hundred and Eight and 26/100 ($8,508.26) heretofore paid in interest on said indebtedness from May 1st, 1924, to the date of the collection of said award, notwithstanding the terms of the written agreements, promissory notes and trust deed between said parties; and said Bank shall also deduct from said voucher the further sum of Ten Thousand Dollars ($10,000) and in consideration thereof said Bank shall pay all attorneys fees incurred in connection with the representation of the owners of the property taken in said condemnation suit and shall hold said Schymanski harmless therefrom, it being understood that said Schymanski has employed no attorneys in connection therewith and has incurred no liability for such attorneys' fees.

"Fourth:..That the remainder of said net award, after the deductions provided for in the preceding paragraph, shall be placed to the credit of said Schymanski in said Bank and said Schymanski shall forthwith proceed with the alteration of said premises to conform with the new lot line in accordance with plans and specifications about to be prepared, which will provide for the division of the first floor space of the building into four store rooms, three facing Ashland Avenue and one facing Gross Avenue, the two northerly stores on the Ashland Avenue frontage to be approximately 15 x 70 feet, the southerly store to be approximately 18 x 70 feet; stairway to the second floor of the building to go through this southerly store; nothing to be done on the second floor of the building at present except to remove all of the partitions; a one story building to be erected on the vacant lot on the Gross Avenue side of the property; oil burner and oil tank to be installed.

"Fifth:..That upon the collection of said award said Schymanski shall execute and deliver to said Bank her promissory notes aggregating Seventy-five Thousand Dollars ($75,000) with interest at six (6%) per cent per annum, due Twenty-five Hundred Dollars ($2,500) in two years, Twenty-five Hundred Dollars ($2,500) in three years, Twenty-five Hundred Dollars ($2,500) in four years and Sixty-seven thousand five hundred dollars ($67,500) in five years after the date thereof, secured by a mortgage or trust deed upon said above described premises, except the part thereof taken by the City of Chicago for the widening of South Ashland Avenue.

"Sixth:..That said Bank shall disburse the balance of said award money left on deposit with it to the credit of said Schymanski, after compliance with the provisions of the third paragraph hereof, in payment of the alterations to said building and the construction of the addition thereto, upon the order of said Schymanski and the delivery to it of mechanic's lien releases only, it being understood and agreed that the contract for such alterations and the construction

and deliver to said Wyandotte [illegible] for the dismissal of said suit in accordance [illegible].

"Second: That said [illegible] from the [illegible] said trust deed [illegible] (1) feet of [illegible] (30) and Thirty (30) of said premises upon [illegible] the City of Chicago for the use and benefit of [illegible] property embraced by said trust deed.

"Third: That said [illegible] voucher so endorsed, shall [illegible] payment of the principal of [illegible] of said Soldiers' Home, the sum of Twenty-five [illegible] and shall also deduct [illegible] interest at four (3%) per cent per annum simple interest on [illegible] said sums [illegible] (3%) per cent on said five [illegible] May 1st, 1924, to the date of the collection of said [illegible] and [illegible] the Soldiers' Home, [illegible] deduct from a [illegible] (10,000) and in consideration of said [illegible] the owners of the said [illegible] said Soldiers' Home [illegible] and has assigned to [illegible] attorney fees.

"Fourth: That [illegible] to said [illegible] to the credit of said [illegible] shall [illegible] conform with [illegible] said [illegible] of the first floor [illegible] of said [illegible] said [illegible] said [illegible] to the [illegible] to remove all of the [illegible] side of the [illegible] oil burner [illegible] the [illegible].

"Fifth: [illegible] shall [illegible] peding seventy-five [illegible] (3) per [illegible] seventy-five [illegible] two years [illegible] seventy-five [illegible] thousand [illegible] promises, [illegible] the [illegible] the filing of [illegible] the filing of [illegible] vance.

"Sixth: [illegible] award money [illegible] after [illegible] in payment of [illegible] of the authority [illegible] upon the [illegible] delivery to [illegible] and [illegible] for [illegible].

of said addition shall contain a provision that the contractor will furnish to said Bank mechanics' lien releases for the full amount of all permits, materials furnished and/or work and labor performed in the alteration of said building and the construction of the addition thereto upon receiving the amount on deposit to the credit of said Schymanski, in the event that said amount shall be less than the amount due to said Contractor under said contract.

"Seventh:..That the Trust Deed to be given by said Schymanski, under the provisions of the fifth paragraph hereof shall contain provisions for the deposit by said Schymanski with said Bank of all rents from said building and the addition thereto, as collected, that said rents so collected and deposited shall be kept in a separate account to be designated "Helen Schymanski Ashland Avenue Rent Account" and shall be disbursed by said Bank upon the order of said Schymanski, first to the payment of the necessary running expenses of said building, including fuel and supplies, second to the payment of taxes, third to the payment of insurance premiums, fourth to the payment of interest and fifth to the prepayment of the principal due at the end of the second, third and fourth years, provided, however, that whenever there shall be in said account sufficient money to take care of the current running expenses of said building including fuel for the next period from October 1st to April 1st; the taxes falling due the following April; the interest falling due on the next interest payment date and the pro-rata share of the next prepayment of principal, any surplus may be withdrawn by said Schymanski.

"Eighth:..That said Schymanski shall be to no expense for commissions, attorneys' fees, services, continuation of abstract, preparation of papers or otherwise, excepting only the recording of the releases of the present trust deed and the recording of the new trust deed to be given by her."

As noted in the agreement of July 17, 1930, the gross condemnation award amounted to $99,527. Two vouchers aggregating this amount were drawn by the city, one for $5,992, the amount of the special assessment against the property, which the intervening petitioner indorsed and delivered to the city, and the other for $93,535, representing the balance of the award, which she indorsed and delivered to the bank. The bank retained as its own property $29,527 of the gross award of $99,527, which was the amount of said award in excess of $70,000. After deducting the special assessment of $5,992 from the $70,000 allocated to the intervening petitioner from the award the balance of $64,008 was either credited to her or paid out on her account by the bank as follows: $25,000 in reduction of the mortgage indebtedness, $10,000 attorneys' fees, $10,641.74 adjusted interest on the original mortgage indebtedness and $18,366.26 in payment for repairs and alterations to the property.

The intervening petition alleged <u>inter alia</u> the making of the several contracts, the execution and delivery of the warranty deed by the bank to Mrs. Schymanski, the disbursement of the award money

of said addition shall constitute a revolving fund the contractor will furnish to said Bank mortgages, liens, [illegible] for the full amount of all permits, materials furnished and/or work and labor performed in the alteration of said building and the construction of the addition thereto upon receiving the amount on deposit to the credit of said Contractor, in the event that said amount shall be less than the amount due to said Contractor under said contract.

"Seventh: That the trust fund to be given by said Contractor under the provisions of the fifth and sixth clauses of this contract provisions for the deposit by said Contractor of a sum of all rents from said building and the addition thereto, as collected, that said rents so collected shall be deposited and kept in a separate account to be designated "Contractor's Rental Account" and shall be disbursed by said Bank upon the order of said Contractor, first to the payment of the necessary running expenses of said building, including fuel and supplies; second to the payment of taxes, third to the payment of insurance premiums, fourth to the payment of interest and fifth to the payments of the principal due at the end of the second third and fourth years, provided, however, that whenever there shall be in said account sufficient money to take care of the current running expenses of said building including fuel for the next period from October 1st to April 1st; the terms falling due the following April; the interest falling due on the next interest payment date and the pro-rata share of the next principal payment, any surplus may be withdrawn by said Contractor.

"Eighth: That said Contractor shall be to no expense for commissions, attorneys' fees, services, consultation of Architect, preparation of papers or otherwise, excepting only the recording of the releases of the mortgages herein and the recording of the new trust deed to be given by him."

As noted in the agreement of July 17, 1930, the gross contraction award amounted to $[illegible]. Two voucher representing this amount were drawn by the city, one for $[illegible], the amount of the special assessment against the property, which on improving petitioner in order to [illegible] to the city, the other for $[illegible], representing the balance of the award, which he endorsed and delivered to the bank. The bank received the one property [illegible] of the gross award of $[illegible], which was the amount of said award in excess of $70,000. After deducting the special assessment of $[illegible] from the $70,000 due to the interveneh petitioner from the award the balance of $[illegible] was credited to petitioner's account by the bank as follows: $[illegible] in reduction of the mortgage indebtedness, $[illegible] to attorney's fees, $[illegible] interest on the original mortgage indebtedness and $[illegible] in payment for repairs and alterations to the property.

The intervening petition alleged that [illegible] the making of the several contracts, the execution and delivery of the [illegible] by the bank to Mrs. [illegible], the disbursements of the money

by the bank and "that at no time was your petitioner ever furnished with an accounting of the distribution of said award thus deposited with the defendant bank." Said petition then alleged certain facts as to the petitioner's unfamiliarity with business matters, her utmost confidence in the officers of the bank and "that she made no effort to find any of the facts as to the accounting for said special deposit, but instead trusted in the officers of said bank and believed that if any balance was due her, said bank would furnish her an accounting forthwith and would remit the net proceeds to her." The petition concluded with a prayer for the entry of an order declaring the petitioner entitled to a special and preferred claim against the assets of the bank to the extent of $30,918.19.

The respondent's answer denied "that the books and records of said bank indicate that at the date of its closing, or at the present time, it was, or is, holding any sums whatsoever for such petitioner for a part or balance of said award in a special account or otherwise." It further denied "that petitioner has any valid claim whatsoever against said bank on account of the deposit of the award set forth in said petition" or "that petitioner in any event is entitled to a preferred claim against the assets of said bank."

The theory of the intervening petitioner as stated in her brief is as follows:

"Petitioner's theory is that she was solicited and urged to purchase the premises in question for an agreed price of $130,000; a payment of $10,000 as earnest money to be made on the signing of an agreement to purchase; an additional $20,000 to be paid on delivery to her of a warranty deed, and the balance to be secured by a trust deed and certain bonds in the sum of $100,000, payable in instalments. That she informed the officers of the Depositors State Bank that she had no funds over and above $30,000 with which to finance such a purchase and was assured by said bank that a certain award would shortly be paid in a certain condemnation proceeding wherein the City of Chicago was seeking to take the west 10 feet of said property for street purposes, and that she, as purchaser, would be entitled to said award and that the same would be amply sufficient to enable her to make the deferred payments on account of a $100,000 balance of the purchase price. That relying on said representations petitioner executed a written agreement on March 3, 1924, for the purchase of said premises for said price of $130,000, and paid the sum of $10,000 earnest money, and thereafter an additional $20,000 as provided in said contract and received a deed to said premises. That in and by said contract of purchase it was provided

by the bank and "that at no time was your petitioner ever furnished with an accounting of the distribution of said sums deposited with the defendant bank." The petition then alleges certain facts as to the petitioner's financial dependency with respect to the utmost confidence in the officers of the bank. It then makes no effort to find any of the facts as to the accounting, or said special deposit, but instead treated in the nature of a bill in equity believed that if any balance was due them, still [illegible] for an accounting forthwith and would [illegible] to have. The petition concluded with a prayer for discovery of an order declaring the petitioner entitled to a preferred and preferred claim against the assets of the bank to the extent of [illegible].

The respondent [illegible] the books and records of said bank indicate that at the time of the closing, or at the present time, it was, or is, holding any [illegible] for the petitioner for a part or balance of said [illegible] or account or otherwise." It further denied that petitioner [illegible] right of [illegible] against said bank [illegible] set forth in said petition" or "that petitioner [illegible] would be entitled to a preferred claim [illegible]."

The theory of the [illegible] petition [illegible] in her brief is as follows:

"Petitioner's theory [illegible] to purchase the [illegible] a payment of [illegible] agreement to [illegible] her of a trustee [illegible] and certain [illegible] she informed the [illegible] funds over [illegible] was assumed by [illegible] in a certain [illegible] seeking to take the [illegible] and that the [illegible] the same could [illegible] payments on [illegible] relying on said representations petitioner [illegible] on March [illegible] $130,000, and [illegible] additional [illegible] said premises. [illegible] and by said contract of purchase it was provided

that as soon as she could collect the award from the City, she should, within 10 days thereafter, pay the sum of $35,000 to apply on the balance of $100,000 purchase price to be evidenced by a purchase money trust deed. That in and by certain written agreements between the parties, dated March 13, 1924, May 13, 1924, and July 17, 1930, the bank fraudulently, inequitably and unconscionably sought to obtain the sum of approximately $30,000 over and above the agreed purchase price of said premises, without any additional or good and valuable consideration therefor, which said agreements were the result of speculation on the part of the bank as to the possible amount of condemnation award that was at that time a mere contingency, not in esse, and that might or might not ever materialize. That said award was not finally reduced to judgment for more than six years after the delivery of the deed to the premises to petitioner, wherein it was provided that she was to have all right and title to said award, and in the meantime, by reason of such delay in the payment of said award, petitioner defaulted in the payments of principal and interest due under said trust deed; whereupon certain negotiations were had by the parties in which it was agreed that if petitioner would execute a new trust deed and bonds in the sum of $75,000, the original trust deed would be released and the foreclosure suit that had been instituted to foreclose said trust deed would be dismissed, she having reduced the amount of her indebtedness by the payment of $25,000 (out of the condemnation award received by her in September, 1930) to apply on said balance of $100,000 evidenced by said original trust deed.

"Petitioner having defaulted in payments under the second trust deed, another bill to foreclose was filed in March, 1932.

"The original award paid by the City to petitioner, having been deposited with said bank in a special deposit in the nature of a trust for the purpose of disbursing the same in accordance with the agreements of the parties with reference to payments on account of the balance of the purchase price, attorneys' fees in the condemnation proceeding and expense incurred in remodeling and reconstructing the front of the building on said premises, the petitioner contends that at the time of the closing of said bank by the Auditor of Public Accounts on January 18, 1932, said bank was holding for petitioner in said special deposit in the nature of a trust, the sum of $30,918.19 for which she is entitled to a special and preferred claim against the assets of said bank. That the acts and conduct of the officers of said bank in the matter of securing the various written agreements between the said bank and the petitioner, wherein and whereby said bank sought and obtained an additional sum of approximately $30,000 over and above the purchase price of $130,000 evidenced by the original agreement of the parties, the warranty deed to petitioner and the original trust deed and bonds in the sum of $100,000 for the balance of said purchase money, were fraudulent, unconscionable and inequitable and wholly without consideration and therefore without legal effect."

The following propositions are advanced by the respondent to sustain the decree:

"The decree is in no respect contrary to the weight of the evidence; the findings of the Master and the chancellor were based upon the contracts introduced in evidence by the petitioner herself. No evidence was introduced contradicting those contracts, nor has it anywhere been indicated in the petitioner's brief how or where the decree is contrary to the weight of the evidence.

"The assertions that the trial court should have raised a constructive trust and should have found the latter contracts to have been executed without consideration are untenable and cannot be urged here, for those points were neither presented nor argued in the trial

court. Moreover there is no evidence in this record which in any way substantiates these claims.

"The petitioner's claim for preference could in no event be allowed because she did not file her claim within the time prescribed by the Court. An orderly liquidation of the Depositors State Bank required that a time limit for the filing of preferred claims be established. Without such a time limit the liquidation of the Bank and the distribution of assets to its creditors would be prolonged indefinitely. The petitioner has neither filed her claim within the time allowed nor has she shown any justifiable reason for her delay."

A careful examination of the entire record discloses that the contentions urged in petitioner's brief that the chancellor should have raised a constructive trust in her favor as to the funds claimed by her and that there was no consideration for the execution of the contracts of March 13 and May 13, 1924, were neither presented nor argued in the trial court. That being so, they cannot be urged or relied upon for the first time in a court of review. (National Corp v. Miller, 292 Ill. App. 612; Taylor v. Baker, 295 Ill. App. 1.)

The only question presented in the trial court and the only real question presented here is whether the intervening petitioner or the bank was entitled to receive the $29,527, which was the amount of the compensation award over and above $70,000.

Petitioner's brief is replete with charges of overreaching and every conceivable kind of fraud against the officers of the bank in their dealings with her, but there is not a particle of evidence in the record to support such charges unless the several agreements themselves may be said to be fraudulent. Mrs. Schymanski did not testify and the only witness who testified in her behalf was her son, Edwin B. Becker, who, as heretofore shown, executed the original purchase agreement as her agent and continued to act as her agent in all the transactions concerning both the property in question and the award. His testimony consisted principally of the identification of the four contracts, the warranty deed and the two vouchers representing the gross award of $99,572, all of which were offered and received in evidence.

As has been noted the original contract of purchase of March 3, 1924, provided that after the deduction of the amount of the special assessment, $10,000 as attorneys' fees in connection with the

court. Moreover there is no evidence in this record which in any way substantiates these claims.

"The petitioner's claim for preference could in no event be allowed because she did not file her claim within the time prescribed by the Court. An out-dry interpretation of the jurisdiction cases shows required that a time limit for the filing of preference claims be established. Without such a time limit the liquidation of the bank and the distribution of assets to its creditors would be prolonged indefinitely. The petitioner has neither filed her claim within the time allowed nor has she shown any justifiable reason for her delay."

A careful examination of the entire record discloses that the contentions urged in petitioner's brief that the Director should have raised a constructive trust in her favor as to the funds claimed by her and that there was no consideration for the abrogation of the contracts of March 19 and May 13, 1934, were neither presented nor urged in the trial court. Thus being so, they cannot be urged or raised upon for the first time in a court of review. (Atkinson v. Miller, 292 Ill. App. 314; Taylor v. Baker, [illegible] Ill. [illegible]).

The only question presented in the trial court and the only real question presented here is whether the Director, in order to the bank, was entitled to receive the [illegible], which is the amount of the compensation owed over and above [illegible].

Petitioner's brief in replies with charges of overreaching and every conceivable kind of fraud as to the officers of the bank in their dealings with her, but there is no [illegible] of evidence in the record to [illegible] the charges [illegible] the [illegible] themselves may be said to be [illegible]. The [illegible] not testify and the [illegible] testified in her behalf [illegible] within 30 days, [illegible] alone, exercised the only [illegible] purchase [illegible] contracted to [illegible] all the transactions [illegible] reversing [illegible] award. The [illegible] contracts [illegible] the form contract, [illegible] and [illegible] the gross [illegible] of [illegible] all of which were [illegible] evidence.

As has been not [illegible] the original [illegible] of [illegible], 1934, provid[illegible] the [illegible] of [illegible] assessment, [illegible] [illegible] in [illegible]

condemnation proceeding and $35,000 to apply on account of the first mortgage bonds given in partial payment of the purchase price, the balance of the award should go to the purchaser.

The second contract executed on March 13, 1924, modified the original contract made ten days earlier in several respects and provided inter alia that if the award was in excess of $70,000, such amount over and above $70,000 "shall be and become the absolute property of the seller."

The warranty deed from the bank to Mrs. Schymanski, executed and delivered on May 1, 1924, provided that "she had the right and title to all compensation or remuneration which may become due from the City of Chicago for the taking of the W. Ten (10) feet of said Lots."

The third contract between the parties entered into on May 13, 1924, supplemented the second contract of March 13, 1924, and reaffirmed the provisions thereof as to the ownership by the bank of that portion of the award in excess of $70,000.

The amount of the condemnation award had been determined when the fourth contract was executed July 17, 1930, and it will be recalled that this contract was entered into after the parties had become engaged in litigation in which the bank sought to foreclose the trust deed theretofore executed by Mrs. Schymanski and was concerned primarily with the settlement of that foreclosure proceeding and the controversy which had arisen between the parties concerning the question of interest payments on the bonds since the date of the execution of the warranty deed and the trust deed on May 1, 1924. It provided that the foreclosure proceeding would be dismissed, that the original trust deed would be released, that the petitioner would be required to deposit only $25,000 of her share of the award instead of $35,000 as originally specified, that new promissory notes totalling $75,000 and a new trust deed would be executed by the petitioner and that the interest then due would be reduced from 6% to 3% for the period from May 1, 1924, to the date of the collection of the award.

Whether Mrs. Schymanski or the bank was entitled to the $29,527 -

condemnation proceeding and $35,000 to apply on account of the first mortgage bonds given in partial payment of the purchase price, the balance of the award should go to the purchaser.

The second contract executed on March 13, 1924, modified the original contract made ten days earlier in several respects and provided inter alia that if the award was in excess of $70,000, such amount over and above $70,000 "shall be and become the absolute property of the seller."

The warranty deed from the bank to Mrs. Schwarzkopf, executed and delivered on May 1, 1924, provided that "she had the right and title to all compensation or remuneration which may be due from the City of Chicago for the taking of the N. Ten (10) feet of said lots."

The third contract between the parties entered into on May 13, 1924, supplemented the second contract of March 13, 1924, and reaffirmed the provisions therein as to the ownership by the bank of that portion of the award in excess of $70,000.

The amount of the condemnation award was been determined when the fourth contract was executed July 17, 1930, and it will be recalled that this contract was entered into after the parties had become engaged in litigation in which the bank sought to foreclose the trust deed therefore executed by Mrs. Schwarzkopf and was concerned primarily with the settlement of that foreclosure proceeding and the controversy which had arisen between the parties concerning the question of interest payments on the bonds since the date of the execution of the warranty deed and the trust deed on May 1, 1924. It provided that the foreclosure proceeding would be dismissed, that the original trust deed would be released, that the petitioner would be credited to deposit only [illegible] of the award instead of $[illegible],000 as originally specified, that the promissory notes totalling $[illegible],000 and a new trust deed would be executed by the petitioner and that the interest then due would be reduced from [illegible] to 3% for the period from May 1, 1924, to the date of the collection of the award.

Whether Mrs. Schwarzkopf or the bank was entitled to the $[illegible] -

the amount of the award in excess of $70,000 - in our opinion, is purely a question of the proper interpretation to be given to the series of contracts. The original contract of purchase of March 3, 1924, and the warranty deed provided that Mrs. Schymanski, the purchaser, was entitled to the entire net award, regardless of the amount thereof, while the contracts of March 13, 1924, and May 13, 1924, provided that all the award in excess of $70,000 should be the property of the bank, the seller. The contract of July 17, 1937, made for the purposes heretofore mentioned, was not inconsistent with the terms of the contracts of March 13 and May 13, 1924, as to the respective shares of the parties in the award and was not intended to modify such terms in any respect.

As already stated, the petitioner was represented by her son in the original contract of purchase and he continued to act in her behalf until the award, less the special assessment, was finally collected by petitioner from the city, delivered by her to the bank and distributed. Commencing with the execution of the second contract March 13, 1924, the petitioner was also represented by Adelor J. Petit as her attorney, and he continued to represent her throughout all her dealings with the bank. It was he, who, acting in her behalf, prepared the contracts of March 13, 1924, May 13, 1924, and July 17, 1930, the first two of which expressly and definitely declared that the award, in so far as it exceeded $70,000, belonged to the bank and it is fair to assume that when he drafted the contract of July 17, 1930, he did so in the light of the other two contracts previously prepared by him. Neither Becker nor Adelor J. Petit, who was a former judge of the Circuit court of this county and has been a respected member of the Bar of this community for over forty-five years, in their testimony before the master, made any statement from which even the slightest inference could be drawn that petitioner had been overreached, that fraud was practiced upon her, or that she relied upon the officers of the bank.

It must be borne in mind that all the contracts were introduced in evidence before the master by the petitioner and that she raised

the amount of the award in excess of $70,000 - in our opinion, is purely a question of the proper interpretation to be given to the series of contracts. The original contract of purchase of March 3, 1924, and the warranty deed provided that Mrs. Conyngham, the purchaser, was entitled to the entire net award, regardless of the amount thereof, while the contracts of March 13, 1924, and May 13, 1924, provided that all the award in excess of $70,000 should be the property of the bank, the seller. The contract of July 17, 1927, made for the purposes hereinbefore mentioned, was not inconsistent with the terms of the contracts of March 13 and May 13, 1924, as to the respective shares of the parties in the award and was not intended to modify such terms in any respect.

As already stated, the petitioner was represented by her son in the original contract of purchase and he continued to act in her behalf until the award, less the special assessment, was finally collected by petitioner from the city, delivered by her to the bank and distributed. Commencing with the execution of the second contract March 13, 1924, the petitioner was also represented by Adelor T. Petit as her attorney, and he continued to represent her throughout all her dealings with the bank. It was he, who, acting in her behalf, prepared the contracts of March 13, 1924, May 13, 1924, and July 17, 1930, the first two of which expressly and definitely declared that the award, in so far as it exceeded $70,000, belonged to the bank and it is fair to assume that when he drafted the contract of July 17, 1930, he did so in the light of the other two contracts previously prepared by him. Neither Decker nor Adelor T. Petit, who was a former judge of the Circuit court of this county and has been a respected member of the Bar of this community for over forty-five years, in their testimony before the master, made any statement from which even the slightest inference could be drawn that petitioner had been overreached, that fraud was practiced upon her, or that she relied upon the of ficers of the bank.

It must be borne in mind that all the contracts were introduced in evidence before the master by the petitioner and that she raised

no question as to the validity of any of them in the trial court. In any event the second contract of March 13, 1924, is not subject to the objection that it was invalid for lack of consideration. It has been repeatedly held that the parties to a contract while it remains executory, may by a subsequent agreement modify or annul the original agreement. The original contract of purchase was still executory on March 13, 1924, when the second contract was made on that date and though said original agreement "was based upon a valid consideration, the parties could modify or alter the agreement or substitute a new agreement in place thereof. The new agreement would be adequate consideration for abrogating the old." Business Women's Holding Co. v. Farmers Bank, (Minn. 1935) 99 A. L. R. 576, 259 S. W. 812. (To the same effect are Dickson v. Owens, 134 Ill. App. 56; Commercial Power Line v. Anderson, 224 Ill. App. 187.) It is true that the warranty deed to Mrs. Schymanski, which contained a provision that the entire net award should go to her, was executed on May 1, 1924, after the execution of the second contract of March 13, 1924, but that such provision was included in the deed through inadvertence or mistake is clearly indicated by the supplemental agreement of May 13, 1924, which was drawn by petitioner's attorney and signed by her and the officers of the bank. This supplemental agreement reiterated and reaffirmed the provisions of the agreement of March 13, 1924.

The petitioner insists that all the prior agreements were merged in the contract of July 17, 1930, and that this contract provided that she was entitled to all the net award after the aforesaid deductions were made. A fair construction of this contract precludes any such conclusion. As has been shown the contract of July 17, 1930, was executed after the amount of the condemnation award had been determined. It is conceded by petitioner that this agreement was concerned primarily with the settlement of the proceeding which had theretofore been brought against her by the bank to foreclose her trust deed and with the matter of the delinquent interest due from her since May 1, 1924, on her bonds secured by said

o question as to the validity of [illegible] in the trial court. In
ny event the second contract of March 1, 1929, is not subject to the
bjection that it was invalid for lack of consideration. It has been
epeatedly held that the promise to a contract while in running order,
ory, may by a subsequent agreement modify or [illegible] the original agree-
ent. The original contract of [illegible] was still executory on March 1,
924, when the second contract was made on [illegible] though said
riginal agreement "was based [illegible] valid consideration, the parties
ould modify or alter the [illegible] substitute a new agreement in
lace thereof. The new agreement would [illegible] consideration for
bsorbing the old." [illegible] v. [illegible]
Minn. 1935) 99 [illegible] 1, 4 [illegible] . . . 1. [illegible] (To [illegible] of the
ickson v. Owens, 1 4 [illegible] . . . [illegible] Power Line v. [illegible]
24 III. App. 1924.) It is [illegible] by [illegible] to [illegible] which contained a provision [illegible] should go to [illegible]
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nterest due from [illegible] 1, 19[illegible]

trust deed. Every term and condition of the contract of July 17, 1930, was complied with by both parties to that instrument. That the parties contemplated under the contract of July 17, 1930, that petitioner's share of the award was only $70,000 is evidenced by the provision therein "That said Bank shall disburse the balance of said award money left on deposit with it to the credit of said Schymanski after compliance with the provisions of the third paragraph hereof [payment on bonds, adjusted interest and attorny fees], in payment of the alteration to said building and the construction of the addition thereto." The balance of the award money referred to in the foregoing provision, which was left on deposit with the bank to Mrs. Schymanski's credit for alterations after the admitted authorized deductions, could only mean the $18,366.26 disbursed by the bank on petitioner's order for repairs and alterations. It has already been shown that this amount plus the special assessment of $5,992, the $25,000 payment on the bonds, the $10,641.74 for adjusted interest and the $10,000 attorney fees amount to $70,000, petitioner's share of the award as specified in the two preceeding contracts.

If we were to assume that the contracts as a series are inconsistent and ambiguous, it would then be pertinent to consider how the parties treated them and what interpretation they themselves placed upon them. October 10, 1930, the bank sent the following letter to petitioner:

"Mrs. Helen Schymanski,
1867 North Damen Avenue,
Chicago, Illinois.

Dear Mrs. Schymanski:

In accordance with our conversation this afternoon, we are enclosing a copy of a memorandum which is to be endorsed on the contract of July 17th, 1930 and signed by yourself and the officers of this Bank.

You will understand that no disbursements can be made from the proceeds of the award check until the endorsement referred to above has been made.

Yours very truly,
R. D. Mathias,
President."

The memorandum referred to in this letter provides:

"It is Mutually Understood And Agreed between the parties to the contract on which this endorsement is made, that the disposition

trust deed. Every term and condition of the contract of July 17, 1930, was complied with by both parties to that instrument. That the parties contemplated under the contract of July 17, 1930, that petitioner's share of the award was only $70,000 is evidenced by the provision that "That said Bank shall disburse the balance of said award money left on deposit with it to the credit of said Johnsmanek after compliance with the provisions of the third paragraph hereof [payment on bonds, adjusted interest and attorney fees], in payment of the alteration to said building and the construction of the addition thereto." The balance of the award money referred to in the foregoing provision, which was left on deposit with the bank to Mrs. Johnsmanek's credit for alterations after the admitted authorized deductions, totals only when the $18,[illegible] disbursed by the bank on petitioner's order for repairs and alterations. It has already been shown that this figure plus the special assessment of $5,992, the $25,000 payment on the bonds, the $10,041.72 for adjusted interest and the $10,000 of attorney fees amounts to $70,000, petitioner's share of the award as specified in the two preceding contracts.

If we were to [illegible] that the contracts [illegible] are inconsistent and ambiguous, it would then be pertinent to consider how the parties treated them and what interpretation they themselves placed upon them. October 10, 1930, the bank sent the following letter to petitioner:

"Mrs. Helen Johnsmanek,
1807 North Damen Avenue,
Chicago, Illinois.

Dear Mrs. Johnsmanek:

In accordance with our conversation this afternoon, we are enclosing a copy of a [illegible] which it is [illegible] on the contract of July 17th, 1930 [illegible] of this bank.

You will understand that no disbursement can be made from the proceeds of the award until the [illegible] referred to above has been made.

Yours very truly,
G. O. Martens,
President."

The memorandum referred to in this letter provides:

"It is Mutually Understood and Agreed between the parties to the contract on which this endorsement is made, that the disposition

provided for herein of the proceeds of the voucher of the City of Chicago for the net amount of the award, applies and refers to only that portion of the award which was the property of Helen Schymanski, in accordance with the provision of existing contracts, namely Seventy Thousand Dollars ($70,000), and is not to effect the remainder of such award, namely Twenty-nine Thousand Five Hundred Twenty-seven Dollars ($29,527) which is the property of the Depositors State Bank under the terms of said existing contracts."

On the hearing before the master petitioner's attorney acknowledged the receipt by Mrs. Schymanski of both the foregoing letter and memorandum and while there was no evidence presented that she ever signed this memorandum, there is testimony in the record to the effect that the memorandum was dictated by Judge Petit, petitioner's attorney, in the presence of an officer of the Depositor's State Bank.

On October 13, 1930, petitioner replied to the bank's letter of October 10, as follows:

"R. D. Mathias, Pres.,
Depositors State Bank,
4701-3 S. Ashland Ave.,
Chicago, Ill.

Dear Mr. Mathias,

Replying to your letter of the 10th inst., will say that I have performed all of the Contracts between us and now insist upon you placing to my credit the sum of $18,966.26, making same available immediately to pay for the remodeling of my building.

Sincerely yours,
Helen Schymanski."

It will be noted that petitioner made no claim in this letter for the $29,527, but merely requested that there be placed to her credit $18,966.26, which was the balance remaining from her $70,000 share of the award after the authorized deductions had been made. Her credit for the remodeling of the building was thereafter reduced to $18,366.26, because $600 of this credit had to be applied in payment of additional interest which had accrued.

On October 15, the bank forwarded this letter to petitioner:

"Mrs. Helen Schymanski,
1867 North Damen Avenue,
Chicago, Illinois.

Dear Mrs. Schymanski:

This will acknowledge receipt of your letter of October 13th, 1930, stating that you have performed all of the contracts between us and insisting that we place to your credit the sum of $18,966.26 to

provided for herein of the proceeds of the voucher of the City of Chicago for the net amount of the award, supplies and refers to only that portion of the award which was the property of Helen Schymanski, in accordance with the provision of existing contracts, namely Seventy Thousand Dollars ($70,000), and is not to effect the remainder of such award, namely Twenty-nine Thousand Five Hundred Twenty-seven Dollars ($29,527) which is the property of the depositors state bank under the terms of said existing contracts."

On the hearing before the master petitioner's attorney acknowledged the receipt by Mrs. Schymanski of both the foregoing letter and memorandum and while there was no evidence presented that she ever signed this memorandum, there is testimony in the record to the effect that the memorandum was dictated by Judge Mitt, petitioner's attorney, in the presence of an officer of the Depositor's State Bank.

On October 13, 1930, petitioner replied to the bank's letter of October 10, as follows:

"Mr. D. Mathias, Pres.,
Depositors State Bank,
4701-3 W. Madison Ave.,
Chicago, Ill.

Dear Mr. Mathias,

Replying to your letter of the 10th inst., will say that I have performed all of the contracts between us and now insist upon you placing to my credit the sum of $70,000.00, making same available immediately to pay for the remodeling of my building.

Sincerely yours,
Helen Schymanski."

It will be noted that petitioner made no claim in this letter for the $29,527, but merely requested that there be placed to her credit $98,962.26, which was the balance remaining from her $70,000 share of the award after the authorized deductions had been made. Her credit for the remodeling of the building [illegible] $70,000, because $600 of this credit was to be taken in payment of attorney's interest which had accrued.

On October 15, the bank forwarded this letter to petitioner:

"Mrs. Helen Schymanski,
1307 North Damen Avenue,
Chicago, Illinois.

Dear Mrs. Schymanski:

This will acknowledge receipt of your letter of October 13, 1930, stating that you have performed all of the contracts between us and instructing that we place to your credit the sum of $98,962.26 to

be used for the purpose of remodeling your building. We have definitely informed you that we were not willing to deposit the sum of $18,366.26 and to proceed with the remodeling of your building unless that was to represent a complete fulfillment by us of our obligationsunder the contracts and of all your interest in the award of the City of Chicago. Your offer necessarily being made upon the above basis, is accordingly accepted as a complete performance of our mutual obligations under the contracts and we will, therefore, deposit $18,366.26 to your credit and make the same available for the remodeling of your building.

The difference of $600.00 in the figures above is represented by accrued interest on the mortgage of $75,000 from date of signing to September 18th, which we will credit as a separate item.

Yours very truly,
R. W. Mathias."

The most important evidence in the record indicative of the understanding of petitioner as to the distribution of the award is the letter written by her attorney on September 17, 1930, which is, in part, as follows:

"Depositors State Bank,
4701 S. Ashland Ave.,
Chicago.

Gentlemen: Attention - Mr. Mathias.

I have checked over the figures left with me today by Mr. Mathias, and have revised them to September 18, 1930. They now read as follows:

| | | |
|---|---|---|
| Helen Schymanski's share of award..... | | $70,000.00 |
| Special assessment paid..... | $ 5,992.00 | |
| Attorneys fees deducted..... | 10,000.00 | |
| Principal of Mortgage, deducted..... | 25,000.00 | |
| Balance of interest on mortgage, deducted..... | 10,641.74 | 51,633.74 |
| Balance to Helen Schymanski's credit for remodeling | | $18,366.26 |

***

Sincerely yours,
Adelor J. Petit."

Petitioner filed a cross bill on January 19, 1929, in the first proceeding filed by the bank to foreclose her trust deed, in which she alleged <u>inter alia</u> "that accordingly, in equity and good conscience, the cross-defendant, THE DEPOSITORS STATE BANK should deliver up and cancel the bonds mentioned in the original bill to the extent of SIXTY THOUSAND DOLLARS ($60,000) said SIXTY THOUSAND DOLLARS ($60,000) being the amount due your oratrix by reason of the said award, and that your oratrix is entitled in equity and good conscience to be credited on her

be used for the purpose of remodeling your building. We have definitely informed you that we are not willing to consider the sum of $10,000.00 and to proceed with the remodeling of your building unless that was to represent a complete fulfillment by us of our obligations under the contract on the part of the Insured in the award of the City of Chicago. Now, we have strictly being made upon the above basis. In contending, you have a complete performance of our mutual obligations under the contract, and will, therefore, [illegible] to [illegible] the same available for [illegible] of your [illegible].

The difference of [illegible] in our figures [illegible] represented by accrued interest [illegible] from date of signing to [illegible] which [illegible] a separate item.

[illegible]

The most important [illegible] in the [illegible] of the

understanding of [illegible] the disagreement [illegible] the [illegible]

the letter written by [illegible] which is

in part, as follows:

"Depositors State Bank,
4701 [illegible] Ave.,
Chicago.

Gentlemen: [illegible]

I have checked over the [illegible] matter, and have invited them to [illegible] now read as follows:

Helen Schwarzenbach [illegible] ..... [illegible]
Special accounting [illegible] ..... [illegible]
Attorneys fees [illegible] ..... [illegible]
Principal of [illegible] ..... [illegible]
Balance of [illegible]
deducted..... [illegible]

Balance to [illegible]
for remodeling: [illegible]

***

[illegible]

[illegible]

proceeding filed by [illegible]

alleged [illegible]

the cross-defendant, [illegible]

cancel the bonds [illegible]

THOUGH [illegible] (50,000.00) said [illegible]

the amount due your [illegible] by reason of [illegible]

creditor is entitled in [illegible]

indebtedness in the sum of SIXTY THOUSAND DOLLARS." It should be noted that when the intervening petitioner filed this cross bill she did not claim the entire award but only that she was entitled to $60,000 thereof. In other words she claimed that she should be allowed a credit on the mortgage bonds to the extent of $70,000, her share of the award, less $10,000, the amount she agreed to pay to the attorneys who conducted the condemnation proceedings.

Thereafter a bill of complaint was filed, March 26, 1932, to foreclose the trust deed executed by petitioner on August 1, 1930, as security for her then mortgage indebtedness of $75,000. A cross bill was filed by Mrs. Schymanski in this foreclosure proceeding on January 9, 1933, approximately three years after the award money had been distributed. In this cross bill she alleged that she executed the bonds aggregating $75,000 and the trust deed securing same as the result of duress practiced upon her and that said bonds and trust deed were without consideration. Nowhere in her cross bill did she allege or intimate that the proceeds of the award had not been properly distributed and accounted for.

During the nearly six years that intervened between the receipt and distribution of the award and the filing of her petition in this cause neither Mrs. Schymanski nor any one in her behalf made any objection to the disposition of the proceeds of the condemnation award or advanced any claim for the amount of said award in excess of $70,000.

On August 27, 1934, a decree was entered in this proceeding, which contained the following provision:

> "That the claims of any and all persons for preference against said bank or this estate shall be filed and presented to the receiver or this Court or to the clerk of this Court on or before November 1, 1934, and that from and after said date all persons shall be and are hereby declared to be absolutely and forever barred from filing or presenting claims for preference against said bank or this estate."

Since the intervening petition of Mrs. Schymanski was not filed until July 14, 1936, long subsequent to the date fixed by the decree of the Circuit court for the filing of preferred claims and since no facts were shown or reason assigned why the aforesaid decretal order should not constitute a bar to any claim for preference on the part of the inter-

indebtedness in the sum of [illegible] "[illegible]." It would be noted that when the intervening [illegible] [illegible] and did not claim the entire award but only that the [illegible] of $[illegible],000 thereof. In other words [illegible] the amount [illegible] of the mortgage bonds to the [illegible] $[illegible],000, [illegible] $[illegible],000, the amount she agreed to pay to the [illegible] condemnation proceeding.

There [illegible] 1[illegible], to [illegible] close the [illegible] 1[illegible], [illegible] for her [illegible] of [illegible]. [illegible] was filed on [illegible]. [illegible] 1[illegible], approximately [illegible] in this [illegible] $17,000 and the [illegible] upon [illegible] lowance [illegible] the award has not been properly [illegible] and [illegible].

Owing [illegible] and distribution [illegible] neither [illegible] the disposition of [illegible] claim for the amount of [illegible] $[illegible].

On August 1[illegible], 1[illegible], [illegible] which contained the following provision:

> "That [illegible] said bank or [illegible] or this court on or [illegible] 1[illegible] and [illegible] hereby order [illegible] and for [illegible] withholding of the [illegible] for [illegible]

[illegible] until July 1[illegible], 1[illegible] [illegible] of the [illegible] of the circuit court for [illegible] or partition [illegible] are shown or [illegible] why the [illegible] should not be entitled to any claim for [illegible] on the part of the [illegible]

vening petitioner, she could not in any event be held to be entitled to any preference over the general creditors of the bank.

We are impelled to hold that the complaint of the intervening petitioner is entirely lacking in merit and that she is not entitled to recover from the respondent, either by way of preference or otherwise, any part of the condemnation award in excess of $70,000.

For the reasons stated herein the decree of the Circuit court is affirmed.

DECREE AFFIRMED.

Friend, P. J., and Scanlan, J., concur.

venue petitioner, she could not in any event be held to be entitled to any preference over the general creditors of the bank.

We are impelled to hold that the conclusion of the latter venue petitioner is entirely logical, inasmuch as she is not entitled to recover from the respondent, either by way of preference or otherwise, any part of the condemnation award in excess of $7,000.

For the reasons stated herein the judgment of the circuit court is affirmed.

MOTION AFFIRMED.

Friend, P. J., and Scanlan, J., concur.

41189

FELIX CENTRACCHIO, Appellant,
v.
CHARLES HILL, Appellee.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

306 I.A. 278

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

The complaint filed by plaintiff, Felix Centracchio, charged that defendant, Charles Hill, maliciously caused his arrest and imprisonment. Defendant was personally served with summons but having filed no appearance or answer an order of default was entered against him on September 20, 1939. On the same day a jury was impanelled to assess plaintiff's damages. The jury, in addition to returning a general verdict finding defendant guilty and assessing plaintiff's damages at $2,250, made a special finding that "malice is the gist of the action." Following is the judgment order, which was also entered on September 20, 1939: "Therefore it is considered by the court that the plaintiff, Felix Centracchio do have and recover of and from the defendant, Charles Hill, his said damages of Two Thousand Two Hundred Fifty Dollars ($2,250) in form as aforesaid by the jury assessed together with his costs and charges in this behalf expended and have execution therefor." On October 16, 1939, the clerk of the Circuit court issued a capias ad satisfaciendum, which was executed by the arrest of defendant on October 21, 1939. On October 26, 1939, defendant's motion to quash the capias ad satisfaciendum was denied. Thereafter, on November 15, 1939, defendant filed a motion and petition to vacate the judgment under section 72 of the Civil Practice act. This motion was continued to November 28, 1939, and denied on that day. The court then on the same day, after examining the record of the proceedings in this cause and finding that the jury was impanelled only for the purpose of assessing damages, stated that the jury was without power to make the

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| FELIX CONTRACOCHIO, appellant, | |
| v. | |
| CHARLES HILL, appellee. | |

APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

306 I.A. 278

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

The complaint filed by plaintiff, Felix Contracochio, charged that defendant, Charles Hill, unlawfully and without his consent and against his imprisonment. Defendant was personally served with summons but having filed no appearance or answer an order of default was entered against him on September 20, 1939. On the same day a jury was impanelled to assess plaintiff's damages. The jury, in addition to awarding a general verdict finding defendant guilty and assessing plaintiff's damages at $4,250, made a special finding that defendant is not guilty of the action." Following is the judgment order, which was entered on September 20, 1939: "Therefore it is considered by the court that the plaintiff, Felix Contracochio, recover and receive of and from the defendant, Charles Hill, his damages of the aforesaid one hundred fifty Dollars ($4,250) in form as aforesaid by the jury assessed together with his costs and charges in this behalf expended and have execution therefor." On October 16, 1939, the clerk of the circuit court issued a capias ad satisfaciendum, which was endorsed by the sheriff of defendant on October 21, 1939. On October 30, 1939, defendant filed a motion to quash the capias ad satisfaciendum was denied. Thereafter, on November 15, 1939, defendant filed a motion and petition to vacate the judgment under section 72 of the Civil Practice Act. This motion was overruled to November 28, 1939, and denied on that day. The court then on the same day, after examining the record of the proceedings in this cause and finding that the jury was impanelled only for the purpose of assessing damages, stated that the jury [illegible] without power to make the

special finding that malice was the gist of the action and suggested that defendant file a motion instanter to quash the capias ad satisfaciendum. Said motion was filed and the court ordered the capias quashed. This appeal by plaintiff followed.

Several contentions are urged by plaintiff for the reversal of the order quashing the writ, but in view of the recent decision of the Supreme Court in Ingalls v. Raklios, 373 Ill. 404 (advance sheets), in which the opinion was filed February 21, 1940, and rehearing denied April 3, 1940, we deem it unnecessary to consider or discuss such contentions. In the light of the Raklios case, the only question before us for consideration and determination is whether the capias ad satisfaciendum issued by the clerk of the Circuit court was void ab initio. If it was, it may be attacked at any time, either in the trial court or for the first time in this court while the cause is pending here on review. If the capias was in fact void, the order of the trial court quashing it must be sustained, even though the reason stated by the court as the basis for its action was improper and insufficient.

In the Raklios case, the court said at pp. 405, 406 and 407:

"A capias ad satisfaciendum issued out of the municipal court of Chicago against appellant based upon a judgment in tort entered in said court June 22, 1938, in favor of appellee and against appellant. Appellant's motion to quash the writ was overruled and he appealed to the Appellate Court where the order was affirmed. Leave to appeal having been granted the case is here for further review.

"The statement of claim alleged appellee had delivered to appellant $2500 to be used in the purchase of certain restaurant equipment which was to be sold at bankruptcy sale. The money was to be used only in event appellant purchased all the property. It was alleged appellant failed to purchase all the property and appellee demanded the return of the money; that appellant failed to return, except as to $500 and that as to the remaining $2000 appellant 'willfully, maliciously and unlawfully converted the same to his own use.' Appellant defaulted and a hearing was had before the court without a jury and judgment rendered for appellee. The pertinent parts of the judgment are 'Court makes special finding of malice. Now comes the plaintiff in this cause, the defendant being absent *** and the cause comes on in the regular course for trial before the court without a jury and the court having heard the evidence *** enters the following finding: The court finds the defendant John Raklios, guilty as charged in plaintiff's statement of claim and

special finding that calls into the list of the jurisdiction and suggested that defendants file a motion [illegible] to [illegible] satisfaction. Said motion was filed and the court ordered the [illegible] dismissed. This appeal by plaintiff followed.

Several contentions are urged by plaintiff for the reversal of the order dismissing the trial, but in view of the recent decision of the Supreme Court in Imella v. [illegible], [illegible] (advance sheets), in which the opinion was filed [illegible] by [illegible], and rehearing denied April [illegible], 1940, we deem it unnecessary to consider or discuss such contentions. In the light of the decision [illegible], the only question before us for consideration is the [illegible] whether the [illegible] satisfactorily issued by the clerk of the [illegible] was void ab initio. If it was, it may be attacked [illegible] either in the trial court or for the first time in this court. [illegible] the cause is pending here on review. [illegible] in 2 or [illegible], the [illegible] of the trial court [illegible] the [illegible] stated by the court [illegible] for its [illegible] and insufficient.

In the [illegible] case, [illegible] the [illegible] said:

"A [illegible] judgment [illegible] court of [illegible] court of [illegible] 1, [illegible], 1, 2, 3, [illegible] entered in [illegible] and against appellant. [illegible] judgment's [illegible] with the [illegible] and be appealed to the [illegible] there [illegible] leave to [illegible] been [illegible] the case is here for [illegible] review.

"The [illegible] of claim [illegible] to appellant [illegible] to be [illegible] of certain [illegible] equipment which [illegible] money [illegible]. The money was to be used only in event [illegible] purchased all the property. It was alleged appellant [illegible] all the property [illegible] demanded the [illegible] money; that appellant failed [illegible] except [illegible] to [illegible] finding [illegible] 'willfully, maliciously, and fraudulently converted the same to his own use.' [illegible] and [illegible] court without a jury [illegible] rendered for appellee. The [illegible] part of the [illegible] court makes special finding of [illegible] now [illegible] in this case, [illegible] being absent *** and the cause comes on in [illegible] for [illegible] the court without a jury and the court [illegible] in evidence *** enters the following finding: The court [illegible] finds [illegible] defendant guilty [illegible] of [illegible] and

assesses the plaintiff's damages at the sum of $2000 in tort.' Then follows the judgment order with the direction for a general execution and 'malice body execution to issue.'

"Appellant contends the only authority for the issuance of the capias ad satisfaciendum is section 5 of the Judgments act (Ill. Rev. Stat. 1939, chap. 77, par. 5) which provides, 'No execution shall issue against the body of the defendant except when the judgment shall have been obtained for a tort committed by such defendant and it shall appear from a special finding of the jury, or from a special finding by the court, if the case is tried by the court without a jury, that malice is the gist of the action,' etc., and that the judgment in this case does not meet the statutory requirements, in that there is no special finding by the court that malice was the gist of the action.

"Section 5 was amended in 1935, the part added being the provision that it shall appear in the judgment, by special finding of the court or jury as the case may be, that malice was the gist of the action. Prior to the amendment, the issuance of a writ was not dependent upon a finding or reference to malice in the judgment, but if the action was in tort, the clerk, upon application issued the writ. (People v. Walker, 286 Ill. 541; Kellar, Ettinger & Fink v. Norton, 228 id. 356.)

"When the debtor made application to be released under the Insolvent Debtors act, an issue was raised as to whether malice was the gist of the action. In determining that question the court referred to the pleadings, and if the allegations showed malice was the gist of the action the doctrine of res adjudicata applied and the issuance of the writ sustained. Jernberg v. Mix, 199 Ill. 254.

"Under section 5, as amended, the clerk of the court is not authorized to issue an execution against the body of the defendant, unless the judgment shows that it was entered upon an action for a tort committed by the defendant and that the judgment contains a special finding of the jury or the court (if the case is tried without a jury) that malice was the gist of the action. If a defendant against whom a writ was issued desires to challenge the sufficiency of the judgment as regards to question of the findings of malice his remedy is to apply to the court entering the judgment to quash the writ. The provisions requiring that before an execution for the body of the defendant shall issue the judgment shall show that the judgment was obtained for a tort committed by the defendant and that malice was the gist of the action, are mandatory, and if such findings do not appear on the face of the judgment, the clerk is without authority to issue the writ. The duty imposed by statute upon the clerk to issue the writ is a ministerial act and he is not permitted to refer to the pleadings to determine whether malice was the gist of the action for the determination of such question is a judicial act. A complaint which states a cause of action having malice as the gist, does not authorize the clerk to issue the writ, unless the judgment contains the essential elements prescribed by statute." (Italics ours.)

It will be noted that in that case the Supreme Court held that it was mandatory under the statute that a finding by the court or jury, as the case might be, that malice was the gist of the action must appear on the face of the judgment itself before an execution for the body of the defendant shall issue and that if such a finding does not appear "on the face of the judgment, the

assesses the damages [illegible] court." Then follows the judgment order [illegible] for a general execution and 'mulct body execution to [illegible].'

"Appellant contends [illegible] for the issuance of the capias ad satisfaciendum [illegible] Rev. Stat. 1929, chap. 77, par. [illegible]) which provides, 'No execution shall issue against the body of the defendant except [illegible] judgment shall have been obtained for [illegible] committed [illegible] and it shall appear from a special finding of the jury, or from [illegible] special finding by the court, if the case be tried by [illegible] jury, that mulct is due and payable [illegible] judgment in this case does not set forth [illegible] special finding by the court [illegible] of the action.

"Section [illegible] provision that it shall [illegible] special finding of the court or jury in the judgment, [illegible] of the action. Prior to the [illegible] of a writ was not dependent upon a finding or [illegible] to issue in the judgment, but if the action was in [illegible] upon application [illegible] writ. (People v. [illegible]) [illegible] Ettinger & Kay v. Norton, 258 Ill. [illegible].)

"When the debtor [illegible] under the [illegible] involvent debtors act, [illegible] was not a [illegible] mulct was the plat of the action. [illegible] that in that [illegible] the court referred to the pleadings, and if the [illegible] mulct was the plat of the action [illegible] pleaded and the issuance of the [illegible] 123 Ill. 254.

"Under section [illegible] of the plaintiff is not authorized to issue a [illegible] the body of the defendant, unless the judgment [illegible] an action for a [illegible] court consists [illegible] a special finding of [illegible] without a jury) [illegible] a defendant against which [illegible] the sufficiency of the judgment [illegible] findings of mulct his remedy is to apply to [illegible] judgment to quash the writ. The provisions [illegible] execution for the body of the debtor [illegible] judgment [illegible] was obligated for [illegible] mulct was [illegible] not appear on the [illegible] to issue the writ. [illegible] to relate back upon the [illegible] to relief to the pleadings [illegible] plat of the action [illegible] for the [illegible] action [illegible] which [illegible] authorize the [illegible] the essential [illegible] mulct [illegible]."

[illegible] that it was [illegible] finding by the court or jury, as the [illegible] the plat of the action must [illegible] execution for the body of the [illegible] such a finding [illegible] the "plat of the [illegible]," the

clerk is without authority to issue the writ."

Plaintiff insists that the word "judgment" as used in the Raklios case was intended to include all orders and findings in the record and that the jury having made a special finding in this case that "malice is the gist of the action" there was a full compliance with the provisions of the statute heretofore referred to, and the clerk of the court had authority to issue the capias. We think that it is a sufficient answer to this contention to state that the word "judgment" has a distinctive meaning in the law. A "judgment" is a final determination of the rights of the parties in an action and we must assume that the Supreme court used the word in its ordinary legal sense. Inasmuch as the Raklios case embodies the construction given by our Supreme court to the foregoing section of the statute, we are impelled to hold that since the judgment in the instant case did not show on its face that malice was the gist of the action, it did not meet the requirements of the statute and that the writ of capias ad satisfaciendum was therefore void and wrongfully issued.

The order of the Circuit court is affirmed.

ORDER AFFIRMED.

Friend, P. J., and Scanlan, J., concur.

clerk is without authority to issue an writ.

Plaintiff's [illegible] and [illegible] "[illegible]" [illegible]

the Kadhion case was invoked to include all courts [illegible] in the
record and that the jury having made a special finding in this case
that "Malice is the play of the action" there was a full [illegible] [illegible]
with the provisions of the [illegible] [illegible] and the
clerk of the court has authority to issue the writ. [illegible] Grant that
it is sufficient answer to make [illegible] that the word
"judgment" has a distinctive meaning in the law, as "judgment" is a
final determination of the rights of the parties in the action, and [illegible]
must assume the [illegible] court and the word in its ordinary legal
sense. Inasmuch as the Kadhion case abolishes the [illegible] [illegible]
by our supreme court to the [illegible] section of [illegible], we are
impelled to hold, where [illegible] judgment in the [illegible] [illegible]
above on its face [illegible] [illegible] "[illegible]", [illegible] not
meet the requirements of the statutes and [illegible] of Kadhion
partial judgment was therefore void and [illegible] [illegible].

The order of the district court is [illegible].

[illegible]

[illegible], [illegible], and [illegible], [illegible], concur.

41262

FRED A. HAASE, Conservator, and FRED A. HAASE, Individually, Appellee,

v.

ANNA L. HAASE, FRANCIS McKEEVER, Guardian ad litem, and LAKE VIEW TRUST & SAVINGS BANK, a corporation, Defendants.

ON APPEAL OF ANNA L. HAASE, Appellant.

INTERLOCUTORY APPEAL FROM CIRCUIT COURT, COOK COUNTY.

306 I.A. 278²

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Fred A. Haase, individually and as conservator of the estate of Anna L. Haase, insane, filed a complaint in the Circuit court for the issuance of an injunction without notice and without bond to restrain Anna L. Haase, her guardian ad litem and her attorneys from proceeding in any manner in the case pending in the Probate court involving the estate of Anna L. Haase and to restrain the Lake View Trust & Savings Bank from paying to said Anna L. Haase any money out of a certain account in said bank. An order was entered directing the injunction to issue without notice and upon the filing of a bond in the sum of $100, which bond was immediately approved. Anna L. Haase (hereinafter sometimes referred to as the defendant) seeks by this interlocutory appeal to reverse the order denying her motion to dissolve the temporary injunction and to dismiss plaintiff's complaint.

Plaintiff's complaint for injunction filed February 28, 1940, alleged substantially that he is the stepson of Anna L. Haase; that he had theretofore, on October 3, 1939, been appointed by the Probate court conservator of the estate of said Anna L. Haase, insane, and that as such conservator he had filed a bond of $14,000 in said court; that while acting as conservator he filed a claim against the estate of his insane ward and a petition requesting the

FRED A. HAASE, Conservator,
and FRED A. HAASE, Individually,
Appellee,

v.

ANNA L. HAASE, FRANCIS McKEEVER,
Guardian ad litem, and LAKE VIEW
TRUST & SAVINGS BANK, a corporation,
Defendants.

ON APPEAL OF ANNA L. HAASE,
Appellant.

INTERLOCUTORY

APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

300 I.A. 278

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Fred A. Haase, individually and as conservator of the estate of Anna L. Haase, insane, filed a complaint in the Circuit court for the issuance of an injunction without notice and without bond to restrain Anna L. Haase, her guardian ad litem and her attorneys from proceeding in any manner in the case pending in the Probate court involving the estate of Anna L. Haase and to restrain the Lake View Trust & Savings Bank from paying to said Anna L. Haase any money out of a certain account in said bank. An order was entered directing the injunction to issue without notice and upon the filing of a bond in the sum of $100, which bond was immediately approved. Anna L. Haase (hereinafter sometimes referred to as the defendant) seeks by this interlocutory appeal to reverse the order denying her motion to dissolve the temporary injunction and to dismiss plaintiff's complaint.

Plaintiff's complaint for injunction filed March 27, 1940, alleged substantially that he is the stepson of Anna L. Haase; that he had therefore, on October 3, 1939, been appointed by the Probate court conservator of the estate of said Anna L. Haase, insane, and that as such conservator he had filed a bond of $4,000 in said court; that while acting as conservator he filed a claim against the estate of his insane ward and a petition to restrain the

appointment of a guardian ad litem to defend against said claim; that upon a hearing on said petition Francis McKeever was appointed guardian ad litem for Anna L. Haase; that Anna L. Haase filed a petition seeking the restoration of her competency and also to revoke his letters of conservatorship, to which petition he filed an answer and the matter was set for hearing on February 23, 1940; that he thereupon filed several petitions, one for the appointment of a disinterested alienist to examine Anna L. Haase, another demanding a jury trial on the issues presented by the various petitions and answers and still another, which sought the return to the estate of certain property alleged to be held by Maurice Lavine, an attorney, who claimed to represent Anna L. Haase and that answers having been filed thereto, these petitions, except that for the appointment of an alienist, which was preemptorily denied, were set for hearing at the same time as the aforementioned petition of Anna L. Haase; that upon the hearing of these matters on February 23, 1940, the Probate court entered an order which revoked his letters of conservatorship, directed him to file a final account and report not later than February 28, 1940, and set for hearing on March 1, 1940, such objectionsas might be filed to his final account and report; that it was further ordered by the Probate court that his claim against the estate of Anna L. Haase be stricken, that his petition for a jury trial be stricken and that his petition for the return by attorney Lavine of certain property be stricken and "that Fred A. Haase forthwith, turn over to Anna F. Haase, all personal and mixed property, evidences of title, evidences of debts, etc.;" that thereupon he prayed an appeal to the Circuit court from such orders; that he caused a notice of such appeal to be served on Anna L. Haase, her attorneys and her guardian ad litem and paid for the transcript of the record; that he presented two separate appeal bonds in the sum of $250 each to the Probate court for approval, but said court failed and refused to approve same; that after the attorneys for Anna L. Haase had been served with the notice of appeal on February 26, 1940, they caused a notice to be served upon

appointment of a guardian ad litem to defend minor children's rights; that upon a hearing on said petition Friends Welfare Society was appointed guardian ad litem for Anna E. Hesse; that June 1, 1939 filed a petition seeking the restoration of her competency and also to revoke the letters of conservatorship, to which petition he filed an answer and the matter was set for hearing on February 23, 1940; that in thereupon filed several petitions, one for the appointment of a disinterested attorney to examine Anna E. Hesse, another demanding a jury trial on the issues presented by the various petitions and answers and still another, which sought the return to the estate of certain property alleged to be held by Maurice Levine, an attorney, who claimed to represent Anna E. Hesse and that answers having been filed thereto, these petitions, except that for the appointment of an attorney, which was promptly denied, were set for hearing at the same time as the aforementioned petition of Anna E. Hesse; that upon the hearing on these petitions on February 23, 1940, the probate court ordered the conservatorship be set aside of the conservatorship, directed him to file a final account and report not later than March 23, 1940, and set for hearing on March 2, 1940, such objections, [illegible] accounts and reports; that it was further ordered by the court that the claim against the estate of [illegible] be stricken, that the petition for a jury trial be stricken and that his petition for the return by attorney Levine of certain property be [illegible] that Fred E. Hesse formally, then over to Anna E. Hesse, all proceeds and mineral [illegible] title, evidences of debts, etc.;" [illegible] to the Circuit court from such order; that he [illegible] notice of said appeal to be served on Anna E. Hesse, Mr. [illegible] and for guardian ad litem and paid for the transcripts of the record; that he [illegible] two separate appeal bonds in the sum of [illegible] to the probate court for approval, but said court failed and refused to approve same; that after the attorneys for Anna E. Hesse had [illegible] the notice of appeal on February 26, 1940, they caused the [illegible] to be delivered upon

Fred A. Haase to appear before the Probate court on February 27, 1940, to answer the motion and petition of Anna L. Haase for a rule on him to show cause why he should not be punished for contempt for his failure and refusal to turn her property over to her as he had theretofore been ordered to do; and that "Fred A. Haase will suffer irreparable financial loss and damage because of his individual joint interest in the bank account in the Lake View Trust & Savings Bank * * * and other property jointly owned, if said Writ of Injunction does not issue against Anna L. Haase, her attorneys, agents, assigns, aids, and servants and Francis McKeever, Guardian ad litem, the Lake View Trust & Savings Bank, if said property personal and mixed are turned over to Anna L. Haase, because he believes and is informed that the same Anna L. Haase, is insane and incompetent to manage and control her own property and that at the hearing on February 23, 1940, in the Probate Court of Cook County, Illinois, no hearing was had determining the rightful ownership of said property and that the court was without jurisdiction to enter the order against Fred A. Haase."

It was further alleged in the complaint that Anna L. Haase was declared insane on September 22, 1939, by a judgment of the County court of Winnebago county, Illinois, and that letters of conservatorship were issued to Fred A. Haase in response to a petition filed by him in the Probate court of Cook county, which petition was accompanied by a certified copy of the judgment of the County court of Winnebago County, declaring Anna L. Haase insane; that on October 13, 1939, an order was entered in the County court of Winnebago county declaring Anna L. Haase sane, from which order an appeal was prayed, which "is still pending in the Circuit court of Winnebago County, Illinois;" and that "during the pendency of the appeals of Fred A. Haase, as Conservator and as an individual, to the Circuit Court of Cook County, Illinois, or until further order of this Court, the plaintiff, Fred A. Haase, as Conservator and as an individual, prays that Writ of Injunction be issued out of this Honorable Court, directed to Anna L. Haase, her attorneys,

Fred A. Hasse to appear before the Probate court on [illegible] 19, 1940, to answer the motion and petition of [illegible]. Hasse for [illegible] on him to show cause why he should not be [illegible] for bonuses for his failure and refusal to turn her property over [illegible] heretofore been ordered to do; and that [illegible]. Hasse will suffer irreparable financial loss and damage because of his individual joint interest in the bank account in the Lake View trust [illegible] * and other property jointly owned, if said writ of injunction does not [illegible] that L. Hasse, nor at anyone, [illegible] Fraucis McGovern, [illegible] the Lake View [illegible] Bank, if said property personal [illegible] turned over to [illegible]. Hasse, because he believes and is informed that the [illegible] is insane and incompetent to manage and control her own property and that at the hearing on [illegible], in the [illegible] of Cook County, Illinois, [illegible] determine the [illegible] ship of said property and the [illegible] authority to enter the order [illegible].

It was further [illegible] . Hasse was declared insane [illegible] of the County court of Winnebago [illegible] conservatorship were issued to [illegible] the Probate court of [illegible] certified copy of the [illegible] declaring Hasse [illegible] entered in the County [illegible] Hasse same, from which [illegible] in the Circuit court of [illegible] the pendency of [illegible] individual, to the [illegible] further order of said court, [illegible] actor and as an individual, [illegible] of this honorable court, directed to same. [illegible]

agents, aids, assigns, servants, and Francis McKeever, Guardian ad litem and Lake View Trust and Savings Bank, a corporation, for good cause shown without notice and without bond, that they be restrained from proceeding any further in the case entitled, IN THE MATTER OF THE ESTATE OF ANNA L. HAASE, INSANE, IN THE PROBATE COURT OF COOK COUNTY, ILLINOIS * * * until the appeals of Fred A. Haase, as Conservator and as an individual, are disposed of completely, or until further order of this Honorable Court."

It was then alleged that "Fred A. Haase and Anna L. Haase have a joint bank account in the Lake View Trust & Savings Bank, a corporation, Chicago, Illinois, with rights of survivorship, which bank account now contains the sum of Ten thousand dollars approximately, and which bank account has been made part of the claim of Fred A. Haase and as yet no hearing has been had in said claim, and that the Lake View Trust & Savings Bank, a corporation, be restrained and enjoined from paying out any money to Anna L. Haase in bank account 13549 until further order of this Court;" that "Fred A. Haase, as Conservator, has filed his inventory and amended inventory in the Estate of Anna L. Haase, Insane, in the Probate Court of Cook County, Illinois, and that said bank account and interest of the Insane Ward and other joint property has been properly listed;" that "since October 3, 1939, Anna L. Haase has received the sum of Nine hundred dollars from another bank account in the Lake View Trust & Savings Bank, a corporation, two hundred and fifty dollars of said sum was received [by] the said Anna L. Haase on February 23, 1940, which money is sufficient to keep and maintain her; that Anna L. Haase is indebted to Fred A. Haase to the extent of approximately $11,000, which amount is now due and owing by her to him; that "if Anna L. Haase receives all the property more specifically set forth hereinabove that the said Anna L. Haase will dissipate said property in question thereby causing this plaintiff to suffer an irreparable damage with reference to his interest therein;" and that "there has never been a hearing with reference to the adjudication of Anna L. Haase's mental competency in any court in Cook county, Illinois,

agents, aids, assigns, servants, and [illegible] whatsoever, [illegible] the Lithem and Lake View Trust and Savings Bank, a corporation, for good cause shown without notice to the [illegible] bond, [illegible] restrained from proceeding any further in the case entitled, IN THE MATTER OF THE ESTATE OF ANNA L. HASSE, INSANE, IN THE PROBATE COURT OF COOK COUNTY, ILLINOIS * * * until the people of Fred A. Hasse, as Conservator and as an individual, are disposed of completely, or until further order of this Honorable Court."

It was then alleged that "Fred A. Hasse [illegible] have a joint bank account in the Lake View [illegible] Savings Bank, a corporation, Chicago, Illinois, with rights of survivorship, which bank account now contains the sum of Ten thousand dollars approximately, and which bank account has been made part of the claim of Fred A. Hasse and as yet no hearing has been had in said claim, and that the Lake View Trust & Savings Bank, a corporation, by [illegible] and withdrawing from paying over any money to Anna L. Hasse in that account [illegible] until further order of this Court;" that "Fred A. Hasse, as Conservator, has filed his inventory and amend & inventory in the Probate Court of Cook County, Illinois, and that said Hasse, in the Probate Court of Cook County, Illinois, and that a joint bank account and interest of the [illegible] joint property has been properly listed;" that "the [illegible] Lake View Trust & Savings Bank has received the sum of [illegible] Dollars, [illegible] another bank account in the Lake View Trust & Savings Bank, [illegible] corporation, [illegible] and fifty dollars of said [illegible] on February [illegible], 1928, [illegible] in her; that Anna L. Hasse is indebted to Fred A. [illegible] of approximately [illegible], which [illegible] is [illegible] that "if Anna L. Hasse receives all the property [illegible] fourth hereinabove [illegible] Anna L. [illegible] will claim to [illegible] property in question [illegible] irreparable damage [illegible] reference to his interest [illegible] "there has never been [illegible] reference [illegible] of Anna L. Hasse's mental incompetency in any court in Cook County, Illinois,

since the appointment of a conservator."

The complaint concluded with the prayer that an injunction issue forthwith "for good cause shown, without notice and without bond" restraining the several defendants as follows:

"(1) That Anna L. Haase, her agents, attorneys, aids, assigns, and servants, be restrained from proceeding in any manner whatsoever, IN THE MATTER OF THE ESTATE OF ANNA L. HAASE, INSANE, until the further order of this Court.

"(2) That Anna L. Haase, be restrained * * * from withdrawing any money from the Lake View Trust & Savings Bank account #13549 in the name of Fred A. Haase & Anna L. Haase, as joint tenants with right of survivorship until the further order of this Court.

"(3) That the Lake View Trust & Savings Bank be restrained * * * from paying to Anna L. Haase, any money now on deposit in account #13549 in said Lake View Trust & Savings Bank, until the further order of this Court.

"(4) That Francis McKeever, Guardian ad litem be restrained * * * from proceeding in any manner in the case entitled IN THE MATTER OF THE ESTATE OF ANNA L. HAASE, INSANE."

As heretofore stated an order was entered by the Circuit court on February 28, 1940, directing that the injunction issue "as prayed for in the Bill of Complaint for Good Cause Shown, without notice and $100 bond."

The motion of defendant Anna L. Haase filed March 1, 1940, to dissolve the injunction and to dismiss the complaint for want of equity was continued to March 4, 1940. On March 5, 1940, the following order was entered: "The Court hereby orders, adjudges and decrees that the plaintiff Fred A. Haase deposit with the Clerk of The Circuit Court of Cook County, Illinois, all the property that he has, personal and mixed, the property involved in the Probate Court of Cook County, Illinois, in the matter of the Estate of Anna L. Haase, Insane; that Maurice Lavine, one of the attorneys for Anna L. Haase, turn over any property that he has belonging to Anna L. Haase, to the Clerk of the

since the appointment of a conservator."

The complaint concluded with the prayer that an injunction issue forthwith "for good cause shown, without notice and without bond" restraining the several defendants as follows:

"(1) That Anna L. Jones, her agents, or servants, or her assigns, and servants, be restrained from proceeding in any manner whatsoever, IN THE MATTER OF THE ESTATE OF ANNA L. JONES, INSANE, until the further order of this Court.

"(2) That Anna L. Jones, be restrained * * * from withdrawing any money from the Lake View Savings and Loan Association #12944 in the name of Anna L. Jones or Anna L. Jones, a joint tenants with right of survivorship until the further order of this Court.

"(3) That the Lake View Savings and Loan Association be restrained * * * from paying to Anna L. Jones, any money on deposit in account #12944 in said Lake View Savings and Loan Association, until the further order of this Court.

"(4) That Frank Jones, however, defendant in this cause be restrained * * * from proceeding in any manner in the cause entitled IN THE MATTER OF ANNA L. JONES, INSANE."

As hereinbefore stated, the cause came on for hearing before the court on February 25, 1944, [illegible] the injunction issue as prayed for in the petition of complainant [illegible] without bond, without notice and $100 bond."

The motion of defendant Anna L. Jones [illegible], to dissolve the injunction [illegible] for [illegible] equity was overruled [illegible] the [illegible] order was entered. "The court hereby orders, adjudges and [illegible] the plaintiff Fred [illegible] Court of Cook County, Illinois, all the [illegible] and mined, the property involved in the [illegible] Illinois, in the matter of the estate of [illegible] Insane Lavine, one of the attorneys for [illegible] property that he has [illegible] to [illegible]

Circuit Court of Cook County, Illinois; that the plaintiff, Fred A. Haase, perfect his appeals from the Probate Court of Cook County, Illinois, to the Circuit Court of Cook County, Illinois, in 48 hours; that in the event the appeals are not perfected within 48 hours, then the Writ of Injunction will be dissolved and the complaint dismissed; that a copy of this order be shown to the Judge of the Probate Court of Cook County, Illinois, and that the Court further orders the pending hearing on these motions be and the same is set for Friday the 8th day of March, A. D. 1940."

On March 8, 1940, an order was entered denying the motion of Anna L. Haase to dissolve the injunction and to strike plaintiff's complaint. As heretofore shown it is from this order that defendant Anna L. Haase appeals. On March 9, 1940, the court on its own motion, modified the writ of injunction by striking therefrom paragraphs one and four, which paragraphs restrained Anna L. Haase, her attorneys and Francis McKeever, her guardian ad litem, from taking any further action in the proceeding pending in the Probate court.

Defendant's theory as stated in her brief is as follows: "It was error for the Court to issue the writ of injunction without notice because it did not appear from the complaint or affidavit that the rights of the plaintiff would be unduly prejudiced; and it was error to issue a writ of injunction on a complaint containing an improper and bad verification. It was also error for the Court to take jurisdiction of the cause on the complaint, which sought to intercept and oust the Probate Court from administering an estate properly before it, and which complaint showed no equitable reason for a court of chancery to intercede. Equity should not intercede when the relief sought is in effect the trial of the right to personal property or to allay fears and apprehensions,or to restrain the transfer of property before a legal claim is established or when the plaintiff has a complete and adequate remedy at law. It is the defendant's theory further that if this Court dissolves the writ of injunction that the complaint should be dismissed

Circuit Court of Cook County, Illinois; that the defendant, Fred A. Hasse, perfect his appeals from the Probate Court of Cook County, Illinois, to the Circuit Court of Cook County, Illinois, in 48 hours; that in the event the appeals are not perfected within 48 hours, then the Writ of Injunction will be dissolved and the complaint dismissed; that a copy of this order be shown to the Judge of the Probate Court of Cook County, Illinois, and that the Court further orders the pending hearing on these motions be and the same is set for Friday the 8th day of March, A. D. 1940."

On March 8, 1940, an order was entered denying the motion of Anna L. Hasse to dissolve the injunction and to strike plaintiff's complaint. As heretofore shown it is from this order that defendant Anna L. Hasse appeals. On March 9, 1940, the court on its own motion, modified the writ of injunction by striking therefrom paragraphs one and four, which paragraphs restrained Anna L. Hasse, her attorneys and Francis McKeever, her guardian ad litem, from taking any further action in the proceeding pending in the Probate court.

Defendant's theory as stated in her brief is as follows:

"It was error for the court to issue the writ of injunction without notice because it did not appear from the complaint or affidavit that the rights of the plaintiff would be unduly prejudiced; and it was error to issue a writ of injunction on a complaint containing an improper and bad verification. It was also error for the court to strike jurisdiction of the cause on the complaint, which sought to restore pt and out the Probate Court from administering an estate properly before it, and which complaint showed no sufficient reason for a court of equity to intervene. Equity should not intervene when the right involved in effect the trial of the right to personal property or to alleg fraud and apprehensions, or to restrain the transfer of property before a legal claim is established or when the plaintiff has a complete remedy at law. It is the defendant's theory further that if this court dissolves the writ of injunction that the complaint should be dismissed

because the complaint prays only for injunctive relief and the dissolution of the writ of injunction is in effect a disposition of the entire matter."

In our opinion the complaint filed in this case is entirely devoid of equity on its face and there is no allegation contained therein that warranted the issuance of the injunction without notice. The complaint presents the rather sorry spectacle of an attempt by plaintiff to take advantage of his aged stepmother, whose interests were entrusted to his protection by reason of his appointment as the conservator of her estate. Anna L. Haase, it will be recalled, was declared insane by the judgment of the County court of Winnebago county on September 22, 1939, and on the strength of that judgment and on his petition plaintiff was appointed conservator of her estate by the Probate court of Cook county on October 3, 1939. Anna L. Haase was thereafter, on October 13, 1939, declared sane by order of the County court of Winnebago County and the complaint in the instant case alleged that "an appeal was prayed from" this order and "is still pending in the Circuit court of Winnebago County." The allegation that the appeal from the order declaring Anna L. Haase sane was still pending in the Circuit court of Winnebago County was untrue and we think it could only have been made to deceive the trial court. Although it does not appear of record in this case that the appeal from the order of the Winnebago County court declaring Anna L. Haase sane was dismissed on February 23, 1940, it was so stated in defendant's brief and not denied by plaintiff in his brief, although the statement is criticized as being outside the record. Plaintiff's complaint herein was filed February 28, 1940, five days after the appeal from the restoration order had been dismissed by the Circuit court of Winnebago county.

After there had been a final adjudication restoring Anna L. Haase to competency there was no other course open to the Probate court of Cook county than to remove Fred A. Haase as her conservator, to dismiss his alleged claim against her estate and to order him to turn over to her all her property that had come into his hands as

because the complaint prays only for injunctive relief and the dissolution of the writ of injunction is in effect a disposition of the entire matter."

In our opinion the complaint filed in this case is entirely devoid of equity on its face and there is no allegation contained therein that warranted the issuance of the injunction without notice. The complaint presents the rather sorry spectacle of an attempt by plaintiff to take advantage of his aged stepmother, whose interests were entrusted to his protection by reason of his appointment as the conservator of her estate. Anna E. Hasse, it will be recalled, was declared insane by the judgment of the county court of Winnebago county on September 22, 1939, and on the strength of that judgment and on his position plaintiff was appointed conservator of her estate by the Probate court of Cook county on October 1, 1939. Anna E. Hasse was thereafter, on October 11, 1939, declared sane by order of the County court of Winnebago County and the complaint in the instant case alleged that "an appeal was prayed from" that order and "is still pending in the Circuit court of Winnebago county." The allegation that the appeal from the order declaring Anna E. Hasse sane was still pending in the Circuit court of Winnebago county was false and we think it could only have been made to deceive the trial court. Although it does not appear of record in this case that the appeal from the order of the Winnebago county court declaring Anna E. Hasse sane was dismissed on October 11, 1939, it was so stated in the plaintiff's brief and not denied by plaintiff in his brief. Although the statement is contained in a pleading outside the record, the plaintiff's complaint herein was filed February 1, 1940, thirty days after the appeal from the restoration order in the County court of the Circuit court of Winnebago county.

After this had been a final adjudication that Anna E. Hasse to complainant herein was no other course open to the Probate court of Cook county to remove Fred A. Hasse as her conservator, to dismiss his alleged claim against her estate and to order him to turn over to her all her property that had come into his hands as

her conservator. The order of the Probate court, which plaintiff claims will cause him irreparable damage, did not direct him to turn over any of his property to defendant but ordered that "Fred A. Haase forthwith turn over to Anna L. Haase all of the personal and mixed property that had come into his possession belonging to Anna L. Haase, including bank books, securities, household goods, personal effects, evidences of title, evidences of debts, etc."

According to his complaint plaintiff took all the steps necessary to perfect appeals, both as an individual and as conservator of the estate of Anna L. Haase, to the Circuit court from the adverse order of the Probate court, except that separate appeal bonds of $250 presented by him had failed to receive the approval of the Probate court. The complaint does not so allege in terms but it is inferable that plaintiff's appeal bonds were not approved because they were deemed insufficient in amount. Instead of presenting to the Probate court for its approval acceptable bonds and availing himself of his legal right of appeal to the Circuit court, Haase instituted this proceeding in equity, whose only purpose as we view it was to interfere with and deprive the Probate court of its jurisdiction to administer the assets of the estate of Anna L. Haase. When the Circuit court in the case at bar ordered Haase to turn over to the clerk of that court all of the assets of the estate of Anna L. Haase, it in effect removed the Probate court proceeding to the Circuit court.

Haase as conservator of the estate of Anna L. Haase is an officer of the Probate court. He was appointed by that court and is subject to its order. It seems quite apparent that plaintiff filed his complaint in the Circuit court to avoid complying with the orders of the Probate court, to whose control and jurisdiction he submitted himself when he was appointed conservator.

We have carefully examined plaintiff's complaint and are unable to find a single allegation therein that would entitle him to injunctive or any other equitable relief. He asserts that Anna L. Haase is indebted to him "in the sum of approximately $11,000." Yet not even

her conservator. The order of the Probate court, which plaintiff claims will cause him irreparable damage, did not direct him to turn over any of his property to defendant but ordered that Fred A. Hasse forthwith turn over to Anna L. Hasse all of the personal and mixed property that had come into his possession belonging to Anna L. Hasse, including bank books, securities, household goods, personal effects, evidences of title, evidences of debts, etc."

According to his complaint, plaintiff took all the steps necessary to perfect appeal, both as an individual and as conservator of the estate of Anna L. Hasse, to the Circuit court from the adverse order of the Probate court, except that separate appeal bonds of $250 presented by him had failed to receive the approval of the Probate court. The complaint does not so allege in terms but it is inferable that plaintiff's appeal bonds were not approved because they were deemed insufficient in amount. Instead of presenting to the Probate court for its approval acceptable bonds and availing himself of his legal right of appeal to the Circuit court, Hasse instituted this proceeding in equity, whose only purpose as we view it was to interfere with and deprive the Probate court of its jurisdiction to administer the assets of the estate of Anna L. Hasse. When the Circuit court in the case at bar ordered Hasse to turn over to the clerk of that court all of the assets of the estate of Anna L. Hasse, it in effect removed the Probate court proceeding to the Circuit court.

Hasse as conservator of the estate of Anna L. Hasse is an officer of the Probate court. He was appointed by that court and is subject to its order. It seems quite apparent that plaintiff filed his complaint in the Circuit court to avoid complying with the orders of the Probate court, to close control and just direction he exhibited himself when he was appointed conservator.

We have carefully examined plaintiff's complaint and are unable to find a single allegation therein that would entitle him to injunctive or any other equitable relief. He asserts that Anna L. Hasse is indebted to him "in the sum of approximately $11,000." Yet notwithstanding

an inkling is given as to the nature of his claim against her or her estate except his alleged interest in the joint bank account. He also asserts that he "will suffer irreparable financial loss and damage because of his individual joint interest in the bank account in the Lake View Trust & Savings Bank *** and other property jointly owned" if the writ of injunction does not issue "because he believes and is informed that the same Anna L. Haase is insane and incompetent to manage and control her own property," and that "Fred A. Haase and Anna L. Haase had a joint bank account in the Lake View Trust & Savings Bank *** with rights of survivorship, which bank account now contains the sum of $10,000 approximately, and which bank account has been made part of the claim of Fred A. Haase." These are the only allegations in the complaint upon which plaintiff can even pretend to predicate a claim for equitable relief. It will be noted that the only fact definitely alleged is that Haase and his stepmother have a joint bank account with the right of survivorship. The order of the Probate court did not attempt to divest him of any right that he might have in this bank account. It merely directed him to turn over to Anna L. Haase her own property inasmuch as she had been declared sane and competent subsequent to his appointment as her conservator. Although it was the solemn obligation and sworn duty of Haase as her conservator to protect and conserve the assets of his ward, he seeks by this proceeding to evade the orders of the Probate court and requests a court of equity to afford him protection and relief from his ward.

There is no allegation in the complaint that plaintiff would be unduly prejudiced if previous notice of his application for the injunction were given to the defendants. Indeed, no such allegation could have been truthfully made since all the assets belonging to Anna L. Haase were in plaintiff's possession when he filed his complaint and it is conceded in his brief that no withdrawals could be made from the joint bank account without the signatures of both himself and Anna L. Haase. Therefore, entirely regardless of any possible right plaintiff might have to equitable relief, the order directing the

an inquiry is given as to the nature of his claim against her or her estate except his alleged interest in the joint bank account. He also asserts that he "will suffer irreparable financial loss and damage because of his individual joint interest in the bank account in the Lake View Trust & Savings Bank *** and other property jointly owned" if the writ of injunction does not issue "because he believes and is informed that the same was L. Hasse in massa and incompetent to manage and control her own property," and that "Fred L. Hasse and Anna L. Hasse had a joint bank account in the Lake View Trust & Savings Bank *** with rights of survivorship, which bank account now contains the sum of $10,000 approximately, and which bank account has been made part of the claim of Fred L. Hasse." These are the only allegations in the complaint upon which plaintiff can even pretend to provide a claim for equitable relief. It will be noted that the only fact definitely alleged is that Hasse and his stepmother have a joint bank account with the right of survivorship. The order of the Probate Court did not attempt to divest him of any rights that he might have in this bank account. It merely directed him to turn over to Anna L. Hasse her own property inasmuch as she had been declared a mentally incompetent. Responsed to his appointment as her conservator. Although it was the solemn obligation and sacred duty of Hasse as her conservator to protect and conserve the estate of his ward, he could by filing pleading to evade the orders of the Probate Court and remove a tort [illegible] to deprive him protection and relief from the court.

There is no allegation in the complaint that PLAINTIFF would be unduly prejudiced if previous notice of his application for the injunction were given to the defendant. Moreover, no such allegation could have been truthfully made since the assets held in the name of L. Hasse were in effect the property of the [illegible] and it is conceded in the brief that no [illegible] from the joint bank account without the signature of [illegible] L. Hasse. Therefore, merely negative the [illegible] plaintiff might have to equitable relief, the [illegible]

issuance of the injunction without notice was erroneously entered and the injunction should have been dissolved on defendant's motion. We are also asked to order or direct the dismissal of plaintiff's complaint but it is not within our province to do so on this interlocutory appeal.

Plaintiff's motion heretofore filed in the nature of a plea of release of error, which was reserved to hearing, is at this time denied.

The order of the Circuit court denying the motion of defendant Anna L. Haase to dissolve the temporary injunction is reversed and the cause is remanded with directions to sustain said motion and to dissolve the injunction.

ORDER REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

Friend, P. J., and Scanlan, J., concur.

issuance of the injunction without notice was erroneously entered and the injunction should have been dissolved on defendant's motion. We are also asked to order or direct the dismissal of plaintiff's complaint but it is not within our province to do so on this interlocutory appeal.

Plaintiff's motion heretofore filed in the nature of a plea of release of error, which was reserved to hearing, is at this time denied.

The order of the circuit court denying the motion of defendant Anna L. Hesse to dissolve the temporary injunction is reversed and the cause is remanded with directions to sustain said motion and to dissolve the injunction.

ORDER REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

Friend, P. J., and Scanlan, J., concur.

41010

and

41075

MIKE SUFA and REGINA SUFA,
Appellees,

v.

LADISLAW VACEK and MARIE VACEK, his wife, CHARLES STANEK and MARIE STANEK, his wife, JOSEPH PUTYRA, ROZALIA PUTYRA, his wife, PROSPECT BUILDING AND LOAN ASSOCIATION, a corporation, VACEK & COMPANY, a corporation, MARIE J. VACEK, PROSPECT FEDERAL SAVINGS & LOAN ASSOCIATION, a corporation,
Defendants.

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On appeal of LADISLAW VACEK and MARIE VACEK, in Appeal No. 41010
Appellants,

On appeal of MARIE J. TUCEK and VACEK & COMPANY, a corporation, in Appeal No. 41075,
Appellants,

On cross-appeal of MIKE SUFA and REGINA SUFA,
Cross-Appellants.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

306 I.A. 279

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

February 10, 1934, plaintiffs obtained a judgment against Ladislaw Vacek and Marie Vacek, his wife, for $1145; appeal was taken to this court where the judgment was affirmed. 279 Ill. App. (abst.) 644. The present proceeding is a creditor's bill seeking assets belonging to defendants out of which to make the judgment.

The complaint asserted defendants owned or were interested in certain parcels of real estate and also had funds on deposit in the Drovers National Bank; answers were filed and the cause was referred to a master who took evidence and reported; he found that the judgment debtors had no interest in the parcels of real estate mentioned in the complaint. As the correctness of this conclusion is not questioned by plaintiffs, the real estate is out of the case.

[illegible]

and

[illegible]

MIKE SUPA and REGINA SUPA,
Appellees,

v.

LADISLAW VACEK and MARIE VACEK, his wife, CHARLES STAREK and MARIE STAREK, his wife, [illegible] PUTNAM, ROSALIE PUTNAM, his wife, PROSPECT BUILDING AND LOAN ASSOCIATION, a corporation, VACEK & COMPANY, a corporation, MARIE J. VACEK, TROSPECT BUILDING SAVINGS & LOAN ASSOCIATION, a corporation,
Defendants.

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On appeal of LADISLAW VACEK and MARIE VACEK, in Cause No. 61013
Appellants,

On appeal of MARIE J. VACEK and VACEK & COMPANY, a corporation, in Appeal No. 61074,
Appellant,

On cross-appeal of [illegible] and REGINA SUPA,
Cross-Appellants.

MR. JUSTICE [illegible] delivered the opinion of the court:

February 17, 1964, [illegible] obtained a judgment against Ladislaw Vacek and Marie Vacek, his wife, for [illegible] and the cases to this court where the judgment was [illegible]. [illegible] 664. The present proceeding [illegible] Marie Vacek in the [illegible] belonging to defendants out of which to make the judgment.

The complaint asserted defendants [illegible] interested in certain parcels of real estate and [illegible] in the Prospect National Bank. [illegible] a master who took evidence and reported [illegible] defendants had no interest in the parcels of real estate [illegible] complaint. As the correctness of this conclusion is not [illegible] plaintiffs, the real estate is out of the case.

906 1A 270

The master further found that the funds in the Drovers National Bank in the account of Vacek & Company, Inc., could not be subjected to the lien of the judgment against Ladislaw Vacek and his wife and that such funds are the individual funds of Marie J. Tucek, the married daughter of defendants. Objections and exceptions were filed to this report, which for the most part the chancellor sustained, and found that upon the date of service of summons there was a balance in the Drovers National Bank in the account of Vacek & Company, a corporation, of $2888.19, and that the assets of this company were the property of defendant Ladislaw Vacek.

The court further found that it had jurisdiction to ascertain and determine the distribution of said funds and to determine whether there was sufficient money on deposit in the bank account to satisfy the judgment of plaintiffs. Leave was given defendants to file pleadings and make as additional parties the various persons to whom, in their opinion, the moneyon deposit in the Drovers National Bank in the account of Marie Tucek, Vacek & Company, a corporation, general account, and Vacek & Company money order account, may belong; that summons issue, returnable on or before 30 days from the date of the decree.

Notice of appeal was filed by defendants Ladislaw Vacek and Marie, his wife; cross-appeal by plaintiffs was also filed, with notice that they would ask the Appellate court to direct that sufficient money on deposit in the Drovers National Bank in the account of Vacek & Company be turned over in satisfaction of their judgment; also a separate notice of appeal was taken by Marie J. Tucek and Vacek & Company, a corporation, from the decree, which states they will ask this court to reverse the decree and remand the cause to the Circuit court with directions to dismiss the complaint for want of equity, and that the master's fees and costs be taxed against plaintiffs.

The chancellor did not accept the evidence of Ladislaw Vacek and his daughter Marie as truthful. Vacek & Company was a partnership engaged in the real estate business, with an office at 1751 S. 47th

The master further found that the funds in the Grover National Bank in the account of Veeck & Company, Inc., could not be subjected to the lien of the judgment against Wallace Veeck and his wife and that such funds are the individual funds of [illegible]. These, the married daughter of defendants. Objections and exceptions were filed to this report, which for the most part the chancellor sustained, and found that upon the date of service of summons there was a balance in the Grover National Bank in the account of Veeck & Company, a corporation, of $2896.10, and that the assets of this company were the property of defendant Wallace Veeck.

The court further found that it had jurisdiction to ascertain and determine the distribution of said funds and [illegible] whether there was sufficient money on deposit in the bank account to satisfy the judgment of plaintiff. Leave was given defendants to file pleadings and make an additional [illegible] the various records in [illegible], in their opinion, the money on deposit in the Grover National Bank in the account of Veeck Veeck & Company, a corporation, general account, and Veeck & Company [illegible] ; that summons issue, returnable on or before 20 days from the date of decree.

Notice of appeal was filed by [illegible] Wallace Veeck and his wife; cross-appeal by plaintiff was also filed, with notice that they would ask the appellate court to direct that sufficient money on deposit in the Grover National Bank in the account of Veeck & Company be turned over in satisfaction of such judgment; also a separate notice of appeal was taken by [illegible] & Company, a corporation, from the decree, [illegible] this court to reverse the decree and remand the cause [illegible] court with directions to dismiss the complaint [illegible], and that the creditor's [illegible] be [illegible].

The chancellor did not accept [illegible] and his daughter Veeck as trustful. Veeck [illegible] engaged in the real estate business, with [illegible]

street in Chicago. Marie Tucek testified that she became the owner of the business, including all the personal property, cash and deposits by reason of a bill of sale dated January 2, 1930; that she was then less than sixteen years of age and was attending school; that she had worked in the office off and on, receiving a salary - not an exact amount but was paid money as she needed it; that she was in school for more than two years after the sale of the property to her; that she did not know how much stock was issued when Vacek & Company was incorporated although she is an officer of that corporation and caused the partnership to be incorporated; that she did not know whether the money in the bank account of Vacek & Company, the partnership, was turned over to the corporation in payment of the capital stock.

The bill of sale ran from Rudolph Vacek, a brother of defendant Ladislaw. It recites no consideration and purports to convey to Marie Vacek certain specific chattels and personal property in the premises at 1751 W. 47th street but does not purport to assign any money or bank account.

The real estate brokerage license was issued to Vacek & Company, and according to the records in the City Hall the persons conducting the business were Ladislaw Vacek, Anthony Vosyka and, at one time Peter Super. Vosyka testified he was a partner with Ladislaw Vacek from 1930 to 1938, and never knew of the claim that Marie Tucek was the owner of the business of Vacek & Company; he said she started to work for this company in the spring of 1936,and was paid a salary. It is significant that three days after plaintiffs obtained their judgment against defendants the partnership account of Vacek & Company in the Drovers National Bank appeared as belonging to Marie Tucek, doing business as Vacek & Company, with power of attorney to Ladislaw Vacek to sign checks. Anthony Vosyka, the other partner, did not know of this arrangement, although he continued to sign checks on the account as before.

street in Chicago. During Mark's tenancy of the premises the owner of the business, including all the national insurance, cash and deposits by reason of a bill of [illegible] January 3, 1940; that she was then less than twenty years of age and was attending school; that she had worked in the office all and on, receiving a salary - not an exact amount but was paid money in the manner in that she is in school for more than two years after the sale of the property in but; that she did not know how much stock was issued when Mark's Company was incorporated although she is an officer of that corporation and owned the particularly, is be incorporated; that she did not know whether the money in the bank account of Mark's Company, the corporation, was turned over to the corporation in exchange of the business stock.

The bill of sale was from Morris Mark, a bachelor of defendant indicia. It recites in consideration and payment to convey to Marie Mark certain specific chattels (not material) property in the premises at 1[illegible]. with stated but not mentioned in taking any money or bank account.

The real estate transfer tax [illegible] Company, and according to the records in the [illegible] the business conducting the business was [illegible] one time later on. [illegible] Vaces from 1940 to 1947, [illegible] was the owner of the business of Mark's Company [illegible] to work for this company in the month of [illegible] and [illegible]. It is significant that none [illegible] judgment against [illegible] in the [illegible] doing business [illegible] Company, [illegible] Vaces to [illegible] money. [illegible] knew of this arrangement, [illegible] account as below.

December 2, 1937, a check was drawn by Ladislaw Vacek for $2888.19, then on deposit in the partnership account of Vacek & Company, to Vacek & Company, Inc. Thus the funds of the partnership were turned over to the corporation. Vacek continued to sign checks upon the account of the corporation. The books and records of the partnership were not produced. Neither were the books of the corporation.

Although able counsel for defendants argue to the contrary, we are of the opinion the trial court properly found that the funds on deposit in the Drovers National Bank in the account of the partnership, and transferred to the corporation, were the funds and property of Ladislaw Vacek.

Plaintiffs by their cross-errors complain that the trial court did not, after the finding of ownership of the deposit, order that plaintiffs' judgment should be paid out of this. Rudolph Vacek, now deceased, the brother of Ladislaw, prior to 1921 conducted a private banking business at 1751 W. 47th street until the law forbidding private banking went into effect. When Rudolph closed his bank certain deposits were not withdrawn by persons entitled to them and these remained with him until January 2, 1930, when he failed and went out of business. Ladislaw testified that Rudolph "lost his money and lost everything he had." Apparently some of the money on deposit with Rudolph was mingled with the money of Vacek & Company. It was argued before the trial court that this money was in the Drovers National Bank to the account of Vacek & Company, Inc., but still belonged to these depositors. Apparently it was for this reason that the trial court gave leave to defendants to make as additional parties the various persons to whom in their opinion the money on deposit might belong, and ordered that summons would issue returnable on or before 30 days from the date of the decree. Defendants took no steps to bring in other parties.

Plaintiffs now argue that the trial court should decree that the amount of plaintiffs' judgment be paid and satisfied out of the funds on deposit. We think the point is well taken. The estate of

However [illegible], a check was issued by [illegible] for $2888.10, then on deposit in the [illegible] to Vaeck & Company, Inc. This the funds [illegible] over to the corporation. These contained [illegible] account of the corporation. The checks [illegible] were not produced. Neither were the books of [illegible].

Although this account for [illegible] are of the opinion the trial court [illegible] deposit in the [illegible] and transferred to the corporation, [illegible] liability.

Plaintiff by their [illegible] court did not, [illegible] that plaintiff's [illegible] now deceased, the [illegible] banking [illegible] private [illegible] deposits were [illegible] business. [illegible] everything [illegible] before the trial court [illegible] to the account of [illegible] depositors. [illegible] gave leave to [illegible] person to [illegible] ordered that [illegible] the date of the [illegible] parties.

Plaintiffs now argue that [illegible] the amount of [illegible] checks on deposit. [illegible]

Rudolph, if any, which would include these deposits held by him, should have been probated. This was not done, and according to Ladislaw's testimony he left no assets or property. Moreover, if there were such depositors leaving funds with Rudolph they were creditors of Rudolph who could make claim against his estate.

That part of the decree should be reversed and the trial court should have decreed that the amount due plaintiffs from the principal defendants be paid and satisfied out of the funds on deposit in the Drovers National Bank.

A motion has been made in this court to dismiss the separate appeal of Marie Vacek and Vacek & Company, a corporation for the reason that they have not complied with rule 35 of the Supreme court, which provides that notice by a coparty desiring to prosecute a cross-appeal must, within ten days after service of notice of appeal, serve a notice upon the opposite parties and file a copy thereof in the trial court. It is unnecessary to pass on this motion as the evidence on behalf of Marie Tucek claiming the fund was considered by the trial court, which found against her claim, which decree we are affirming.

Complaint is made of the taxing of costs, including the master's fees, against Marie J. Tucek. The costs should not be taxed against her but should be against the principal defendants.

So much of the decree as finds that the money on deposit with the Drovers National Bank belongs to Ladislaw Vacek, is affirmed, and the cause is remanded with directions to enter the orders indicated.

AFFIRMED IN PART AND
REMANDED WITH DIRECTIONS.

O'Connor, P.J., and Matchett, J., concur.

Rudolph, if any, which would include these deposits held by him, should have been produced. This was not done, and according to Radisavljevic's testimony he left no assets or property. However, if there were such depositors leaving funds with Rudolph they were creditors of Rudolph who could make claim against his estate.

That part of the decree should be reversed and the trial court should have decreed that the amount due plaintiffs from the principal defendants be paid and satisfied out of the funds on deposit in the Provers National Bank.

A motion has been made in this court to dismiss the separate appeal of Marie Vasek and Jack Vasek; also any, a compensation for the reason that they have not complied with rule 35 of the Supreme court, which provides that notice by a counsel desiring to prosecute a cross-appeal must, within ten days after service of notice of appeal, serve a notice upon the opposite parties and file a copy thereof in the trial court. It is unnecessary to pass on this motion as the evidence on behalf of Marie Vasek claiming the fund was considered by the trial court, which found against her claim, which decree we are affirming.

Complaint is made of the taking of costs, including the master's fees, against Marie v. Vasek. The costs should not be taxed against her but should be against the principal defendants.

So much of the decree as finds that the money on deposit with the Provers National Bank belongs to Radisavljevic Vasek, is affirmed, and the cause is remanded with directions to enter the decree indicated.

[illegible]

O'Connor, P.J., and Matchett, J., concur.

41052

| | | |
|---|---|---|
| THE NEW YORK CENTRAL RAILROAD COMPANY, a corporation, Appellant, | ) | APPEAL FROM |
| v. | ) | MUNICIPAL COURT |
| THOMAS D. PALELLA, et al., individually and doing business as PALELLA BROTHERS, Appellee. | ) | OF CHICAGO. |

306 I.A. 279

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover freight charges amounting to $648.74 which accrued on an interstate shipment of freight originating in California and diverted by defendant at Chicago to Russo Brothers at Syracuse, New York; the case was tried before the court without a jury, who entered judgment for plaintiff in the amount of $57.43, representing the charges accruing beyond the point of diversion. Plaintiff appeals and asks that judgment be entered here for the full amount. No brief has been filed in this court on behalf of defendant.

October 21, 1933, Lachenmaier Brothers delivered to the Atchison, Topeka & Santa Fe Railway Company at Shafter, California, a carload of grapes consigned to itself at Chicago, Illinois; October 28, Lachenmaier Brothers in writing directed the carrier to divert the car to defendant at Chicago; October 30, defendant by written order directed plaintiff to divert the car to Russo Brothers at Syracuse, New York; the car arrived at Syracuse and was placed for delivery. It is not disputed that the lawful freight charges amounted to $648.74.

Subsequent to the delivery of the car Russo Brothers filed a petition in bankruptcy and plaintiff was unable to collect any part of its charges from them.

It was stipulated that defendant was merely acting as agent or broker and had no beneficial interest in the shipment.

Plaintiff asserts that nearly all the cases have decided that where an interstate shipment is diverted or reconsigned to a third

party at a point beyond the original destination, the party ordering such diversion or reconsignment thereby accepts the services rendered and the benefits conferred by the carrier and exercises dominion over the shipment consistent with ownership and becomes liable to the carrier for all transportation charges. This was the holding in New York Cent. R. Co. v. Platt & Brahm Coal Co., 236 Ill. App. 150; Indiana Harbor Belt R. Co. v. Lieberman, 245 Ill. App. 503 and Chicago I. & L. Ry. Co. v. Monarch Lumber Co., 202 Ill. App. 20. And in Mellon v. Landeck, 248 Ill. App. 353, after an extensive examination of cases we held that "The greater weight of authority and the most convincing reasoning favor the rule that, when a consignee orders a reshipment, acceptance of the shipment is necessarily implied." We there held that defendants exercised dominion over the shipment from the time it arrived in Chicago and, at their request, was reconsigned to other parties; that these were clearly acts of presumptive ownership and defendants were liable for the carrier charges.

We also noted two opinions by the Illinois Appellate Court holding to the contrary (Chicago, I. & S. R. Co. v. McMillan & Bro. Coal Co., 207 Ill. App. 58, and Pere Marquette R. Co. v. Am. Coal & Supply Co., 239 Ill. App. 139) but held that they were not controlling upon the undisputed facts in the case under consideration. Ches. & Ohio Ry. Co. v. Southern C. C. & M. Co., 254 Ill. App. 238 and New York Cent. R. Co. v. Transamerican Petroleum Corp., 108 F. (2d) 994, also hold to the contrary. In these cases the diverting consignee directed that the carrier should collect charges from the ultimate consignee. This is not true in the instant case. With the exception of these cases, all the cases which are brought to our attention are in accord with what we said in Mellon v. Landeck, 248 Ill. App. 353.

In New York Cent. R. Co. v. Ross Lumber Co., 234 N.Y. 261, the court, speaking through Mr. Justice Pound, made an extensive examination of the cases upon the point before us and concluded that, "While no contractual relation arises between carrier and consignee by the mere designation of the latter as consignee, the consignee becomes liable for the freight charges when an obligation arises on his part from presumptive ownership, acceptance of the goods and the services

the carrier

rendered and the benefits conferred by the plaintiff for such charges." The reasoning in that case was followed in Wabash Ry. Co. v. Horn, 40 F. (2d) 905; Dare v. New York Cent. R. Co., 20 F. (2d) 379; New York Cent. R. Co. v. Little-Jones Coal Co., 25 F. (2d) 337; Penn. R. Co. v. Lord & Spencer, 3 N.E. (2d) 231, and cases from other states.

Apparently plaintiff permitted Russo Brothers to unload the car more than forty-eight hours after it had been placed for delivery and without collection of the charges. This extension of credit was in excess of the time limit imposed by the Interstate Commerce Commission. However, this fact does not relieve defendant of liability. As was said in L. & N. R. Co. v. Central Iron & Coal Co., 265 U.S. 59, "Nor could any act or omission of the carrier (except the running of the statute of limitations) estop or preclude it from enforcing payment of the full amount by a person liable therefor." This was followed in Great Northern Ry. Co. v. Hyder, 279 F. 783, the reason given there being that the public has an interest in the full freight rate and no act of the parties can deprive the public of this. In New York Cent. R. Co. v. Phil. & R. Coal Co., 236 Ill. 267, the defendant shipped a carload of coal consigned to itself in Chicago and after arrival of the car defendant directed plaintiff to deliver it to another party, with the notation "charges follow;" the coal was delivered to the latter party without payment of the charges; suit was brought against the defendant and plaintiff recovered judgment; appeal was taken to this court (210 Ill. App. 267), where we affirmed the judgment; appeal was then taken to the Supreme court, which also affirmed the judgment, the court saying, among other things, that plaintiff had no right to release defendant from liability to pay the freight, and had it attempted to do so such action would have been unlawful.

It also should be noted that intentional failure to collect the charges from the defendant here would amount to a violation of the so-called Elkins Act amended June 29, 1906 (U.S.C.A., Title 49, §6, par. 7).

For the reasons above indicated we hold that the judgment

rendered and the benefits conferred by the "liability" [illegible] charges." The reasoning in that case was followed in [illegible] v. [illegible], 40 T. (2d) 908; [illegible] v. [illegible], [illegible] (2d) [illegible]; [illegible] York Cent. R. Co. v. [illegible] Coal Co., [illegible]; [illegible] Co. v. Lord & [illegible], [illegible] (2d) [illegible], and [illegible] other cases.

Apparently plaintiff [illegible] unless the car more than forty-eight hours after it [illegible] for delivery and without collection of the charges. [illegible] of detail was in excess of the time limit imposed by [illegible] demurrage commission. However, this fact does not [illegible] liability. As was said in [illegible] v. [illegible], [illegible] "Nor could any act or omission of the carrier [illegible] or the statute of limitations) enlarge or [illegible] of the full amount by a [illegible]. [illegible] Great Northern Ry. Co. v. [illegible], [illegible] being that the public [illegible] not of the parties can deprive the public [illegible] H. Co. v. [illegible] Coal Co., [illegible] carload of coal consigned to itself in [illegible] the car defendant diverted [illegible] with the notation 'demurrage [illegible]' [illegible] latter party without payment of the demurrage [illegible] the defendant and plaintiff [illegible] this court (210 Ill. [illegible]), [illegible] was then taken to the [illegible] court, [illegible] the court saying, among other things, [illegible] release defendant from liability [illegible] compelled to do so upon [illegible].

It also should be noted that [illegible] the charges from the defendant here [illegible] the so-called [illegible] at rendered June [illegible] 16, par. 7).

For the reasons above indicated [illegible]

entered by the trial court was improper and it is reversed and judgment is entered in this court against defendant and in favor of plaintiff for $648.74.

REVERSED AND JUDGMENT ENTER.

Matchett, J., concurs.

O'Connor, P.J., dissents:

I think the judgment should be affirmed. Pere Marquette R. Co. v. American Coal & Supply Co., 239 Ill. App. 139; Chesapeake & O. Ry. Co. v. Southern C. C. & M. Co., 264 Ill. App. 238; New York Cent. R. Co. v. Transamerican Petroleum Corp., 108 Fed. (2d) 994.

entered by the trial court was improper and it is reversed and judgment is entered in this court against defendant and in favor of plaintiff for $648.74.

REVERSED AND JUDGMENT HERE.

Matchett, J., concurs.

O'Connor, P.J., dissents:

I think the judgment should be affirmed. See Kenyatta v. Co. v. American Coal & Supply Co., 328 Ill. App. 124; Shepperson & v. Ry. Co. v. Southern C. R. R. Co., 254 Ill. App. 480; Non Iron Cont. R. Co. v. Transcontinental Petroleum Corp., 1 Ill. App. (2d) 3-4.

41069

JOHN B. BOBZIEN, Trustee,
Plaintiff-Appellee,

v.

BENJAMIN MICHAEL SCHWARTZ, et al.,
Defendants.

On Appeal of METROPOLITAN TRUST COMPANY, Trustee, the Oakdale Building Liquidation Trust,
Intervening Petitioner-Appellant

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

306 I.A. 280

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the intervening petitioner from an order entered September 26, 1939, denying the prayer of its petition that the receiver be discharged and possession of certain premises delivered to petitioner. The matter was heard on the verified petition of petitioner, the verified answer of the receiver thereto and a stipulation of facts by the parties.

Bobzien, trustee in a trust deed which conveyed the premises and the rents, issues and profits thereof to secure an issue of bonds, filed his bill to foreclose and February 27, 1939, obtained a decree finding $127,099.23 to be due and directing the sale of the premises to pay the indebtedness. By the terms of the decree the court retained jurisdiction for the purpose of continuing or appointing a receiver to collect the rents, issues and profits during the period of redemption.

The premises were sold to Clarence J. Olsen, nominee of the Bondholders' Protective Committee, for $27,000. July 11, 1939, an order was entered approving the report of sale, finding a deficiency of $107,565.57, and continuing Bobzien as receiver to collect the rents, income and profits and apply the same on the deficiency.

August 9, 1939, petitioner, as trustee of the Oakdale Building Liquidation Trust, filed its petition setting up that it had

4108

JOHN E. BOSZIAN, Trustee,
Plaintiff-Appellee,

v.

BENJAMIN MICHAEL COHEN, et al.,
Defendants.

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On Appeal of BENJAMIN MICHAEL COHEN v. COMPANY, Trustee, the (Ninth) Building Liquidation Trust,
Interveniing, Petitioner-Appellant.

306 Ill. App. 280

MR. JUSTICE MATHEWS delivered the opinion of the court.

This is an appeal by the intervening petitioner from an order entered September 28, 1939, denying the petition of petitioner that the receiver be discharged and a portion of certain property delivered to petitioner. The petition was based on the rejected petition of petitioner, the real interest of the mortgagee herein and a stipulation of facts by the parties.

Robson, trustee in bankruptcy of the Building Liquidation Trust and the receiver, issued and notice thereof to creditors of the Trust, filed his bill to foreclose the mortgage, [illegible] finding $127,000.00 to be due and therein [illegible] to pay the indebtedness. By the terms of the [illegible] vested jurisdiction for the purpose of [illegible] receiver to collect the rents, issues and profits [illegible] of redemption.

The [illegible] and to [illegible] Bondholders' Protective Committee, for [illegible] order was entered [illegible] the report [illegible] of $107,958.57, and [illegible] rents, income and profits and apply the [illegible].

August [illegible], petitioner, by [illegible] Building Liquidation Trust, filed his [illegible]

become the owner of record in fee simple of the premises; that the period of redemption would expire on August 2, 1940; that it was the holder of $77,400 par value of the total unpaid issue of bonds, which amounted to $79,500; that these bondholders had consented to take part in a trust created and had deposited bonds to the amount of $77,400 for that purpose; that the total outstanding and non-deposited bonds amounted only to $2,100; that petitioner was desirous of obtaining possession of the premises in order to carry out the provisions of the trust of which the premises were a part; that a loan for $20,000 had been negotiated and it was necessary to have the receivership terminated in order that the Chicago Title and Trust Company might issue its usual title mortgage policy; that there were taxes unpaid in excess of $8,000; that part of the proceeds of the loan were to reimburse funds advanced temporarily to pay these taxes which had all been paid in full. The petition set up in detail the receipts and disbursements from the premises during the year 1938, and showing a net balance of $4,841.73, or about $400 per month. Petitioner offered to pay no less than $400 per month for each month remaining on the full statutory period of redemption to apply on the deficiency, and further offered that in the event there was realized a greater net income for that period, it would account for the income and pay the surplus for the benefit of all the bondholders. The prayer was that the receiver be directed to surrender possession forthwith, file his final account and report in five days and upon approval of the account the bond of the receiver and his surety should be canceled and the receiver discharged, petitioner to pay to the trustee at the rate of $400 per month, as above stated.

The answer of Bobzien, as trustee and receiver, averred that the Metropolitan Trust Company was not the owner of any of the bonds and alleged that the outstanding non-deposited bonds amounted to $2,600 instead of $2,400, as stated in the petition. It denied generally that it was necessary for petitioner to obtain possession

become the owner of record in fee simple of the premises; that the period of redemption would expire on August 7, 1940; that it was the holder of $77,400 par value of the total unpaid issue of bonds, which amounted to $78,800; that these bondholders had consented to take part in a trust created and had deposited bonds to the amount of $77,400 for that purpose; that the total outstanding and non-deposited bonds amounted only to $2,100; that petitioner was desirous of obtaining possession of the premises in order to carry out the provisions of the trust of which the premises were a part; that a loan for $20,000 had been negotiated and it was necessary to have the receivership terminated in order that the Illinois title and Trust Company might issue the usual title mortgage policy; that there were taxes unpaid in excess of $9,000; that part of the proceeds of the loan were to reimburse funds advanced temporarily to pay these taxes which had all been paid in full. The petition set up in detail the receipts and disbursements from the premises during the year 1939, and showing a net balance of $4,281.75, or about $400 per month. Petitioner offered to pay no less than $400 per month for each month remaining on the full statutory period of redemption to apply on the deficiency, and further offered that in the event there was realized a greater net income for that period, it would account for the income and pay the surplus for the benefit of all the bondholders. The prayer was that the receiver be directed to surrender possession forthwith, file his final account and report in five days and upon approval of the account the bond of the receiver and his surety should be cancelled and the receiver discharged, petitioner to pay to the trustee at the rate of $400 per month, as above stated.

The answer of Robbins, as trustee and receiver, averred that the Metropolitan Trust Company was not the owner of any of the bonds and alleged that the outstanding non-deposited bonds amounted to $2,800 instead of $2,400, as stated in the petition. It denied generally that it was necessary for petitioner to obtain possession

of the premises and denied it was necessary to terminate the receivership in order that a title mortgage policy might be issued. It further averred that said policy was ready for issuance on or before August 14, 1939. The answer denied that the taxes were unpaid, denied that funds were temporarily advanced to pay the same but averred that all the taxes had been paid from a loan of $20,000, disbursement of which had already been made, and that all taxes including the taxes for 1938 were fully paid on July 31, 1939. The answer averred there was no occasion or reason for removing the present receiver in order to permit the present owner to take possession of the premises; that petitioner was not under the control or authority of the court and did not need to account for any of the funds expended by them as a receiver would be required to do by the court. The answer also averred that the income of the premises up to August 2, 1940, would exceed the income during the year 1938 for the reason that renting conditions were better; that the gross income per month should average $1,200 and disbursements not to exceed $500; that while $400 was the net income received from the premises for each month for the years 1939 and 1940, the net income for the remaining period of redemption should be $650 per month. The answer further set up the powers and rights of Sobzien as trustee under article 8 of the trust deed.

Upon the trial it was stipulated that petitioner was the owner of the fee simple title to the premises and the owner of all the bonds secured by the trust deed foreclosed, excepting $2,600; that on July 1, 1939, petitioner redeemed from the foreclosure sale and the master's certificate of sale was canceled; that the petitioner had offered to pay the non-depositing bondholders at the rate of $600 per month, or any other sum which the court should find to be the net income during the redemption period, and to account for any surplus at the end of the redemption period, if any, and offered to pay the pro rata share to non-depositing bondholders for their share of the rent in one lump sum, computed to the end of the statutory period of redemption at the rate of $600 per month, or any other sum the court

of the premises and denied it was necessary to terminate the receivership in order that a title mortgage policy might be issued. It further averred that said policy was ready for issuance on or before August 14, 1939. The answer denied that the trust are unpaid, denied that funds were temporarily advanced to pay the [illegible] averred that all the taxes had been paid from a loan of $[illegible], disbursement of which had already been made, and that all taxes including the taxes for 1938 were fully paid on July 31, 1939. The answer averred there was no occasion or reason for removing the present receivers in order to permit the present owner to take possession of the premises; that petitioner was not under the control or authority of the court and did not need to account for any of the funds expended by them as a receiver would be required to do by the court. The answer also averred that the income of the premises up to August 4, 1940, would exceed the income during the year 1939 for the reason that rental conditions were better; that the gross income per month exceeds $[illegible] and disbursements not to exceed $800; that while [illegible] the net income received from the premises for each month for the years 1939 and 1940, the net income for the remaining period of reduction should be $[illegible] per month. The answer further set up the powers and duties of receivers as trustees under article 4 of the trust deed.

Upon the trial it was stipulated that [illegible] the owner of the fee simple title to the premises [illegible] the bonds secured by the trust deed foreclosed, [illegible]; that on July 1, 1939, petitioner redeemed from the foreclosure sale and the master's certificate of sale was cancelled; that the [illegible] offered to pay the non-participating bondholders [illegible] month, or any other sum which the court should [illegible] some during the reduction period, and [illegible] the end of the reduction period, if any, [illegible] rata share to non-participating bondholders [illegible] in one lump sum, computed to the end of the [illegible] demption at the rate of $800 per month [illegible]

might fix; had offered to present to the plaintiff trustee all bonds of the issue of the mortgage foreclosed, excepting $2,600, so that there might be properly endorsed on the bonds a credit for the pro rata share of the rents during the period of redemption upon the bonds deposited in lieu of cash. As already stated, the court denied the prayer of the petition.

The appointment and retention of a receiver to collect the rents during a period of redemption is not an exclusive method by which the court may make secure the application of the rents of foreclosed premises to any deficiency. In Quitman, Trustee v. Dowd, et al., 301 Ill. App. 403, the Second Division of this court said:

"Although the trust deed may authorize that a receiver be appointed to collect the rents, it does not necessarily follow that a court of equity will enforce such provision by a particular method, simply because it was so stated in the trust deed. Bothman v. Lindstrom, 221 Ill. App. 262; Bagley v. Ill. Trust & Savings Bank, 199 Ill. 76.

"In the instant case, it may well be that in making the change with reference to the receiver, the court did not intend to continue the expense of receivers' and solicitors' fees and the burden which would fall upon the property by further retaining the receiver in possession. As stated, the appointment of a receiver may have been suitable in the foreclosure of the original trust deed, yet it does not follow that the court is irrevocably bound to follow that method. Contracts specifying a particular remedy do not necessarily bind the court to follow such specification as the sole remedy."

The receiver says there is no evidence in the record to sustain the allegations of the petition. The parties, however, stipulated the material facts and this stipulation, together with the admissions made in the answer sustained, we think, the material averments of the petition. It is objected by the receiver that the petitioner did not offer to comply with the statute requiring the giving of security for rents collected where a receiver is removed and the owner placed in possession. Ill. Rev. Stats. 1937, chap. 22, §2, par. 55. This proceeding did not purport to be under that statute, and it was not necessary that the petitioner should comply with its provisions.

The appeal of the petitioner was to the conscience of the court. In substance, petitioner showed that it held the fee simple

might fix; had offered to present to the plaintiff trustee all bonds of the issue of the mortgage foreclosed, excepting $1,000, so that there might be properly endorsed on the bonds a credit for the pro rata share of the rents during the period of redemption upon the bonds deposited in lieu of cash. As already stated, the court denied the prayer of the petition.

The appointment and retention of a receiver to collect the rents during a period of redemption is not an ordinary method by which the court may make secure the obligation of the mortgagee premises to any deficiency. In Jackson, Trustee v. Ludd, et al., 101 Ill. App. 402, the second division of this court said:

"Although the trust deed may authorize that a receiver be appointed to collect the rents, it does not necessarily follow that a court of equity will enforce such provision by a particular method, simply because it was so stated in the trust deed. Hoffman v. Lindstrom, 221 Ill. App. 70; Jones v. Ill. Trust & Savings Bank, 189 Ill. 76.

"In the instant case, it may well be that in making the change with reference to the receiver, the court did not intend to continue the expense of receivers' and solicitors' fees and the burden which would fall upon the property by further retaining the receiver in possession. As stated, the appointment of a receiver may have been suitable in the foreclosure of the original trust deed, but it does not follow that the court is irrevocably bound, to follow that method. Courts especially in particular remedy do not necessarily bind the court to follow such modification as it may deem."

The receiver made three [illegible] in the course of the [illegible] sustain the allegations of the petition. The receiver, however, stipulated the material facts and the additional, together with the admissions made in the answer and [illegible], the [illegible] statements of the petition. It is admitted by the pleadings that the petitioner did not offer to pay into the [illegible] of security for rents collected since a receiver is appointed [illegible] owner placed in possession. Ill. Rev. Stat. 1947, ch. [illegible], [illegible] 36. This proceeding did not support the [illegible] it was not necessary that the petitioner should [illegible] violations.

The appeal of the petitioner was to the chancellor [illegible] court. In substance, petitioner alleged that it would be [illegible]

title to the premises and held the same for about 98% of the investors in the bonds secured by the trust deed. It showed that as such owner it was ready, able and willing to pay in cash a sum equal to all the rents, incomes and profits which would be realized during the period of redemption. On the record we cannot conceive of any reason why the petition of the owner should have been denied other than that the receiver might be deprived of the compensation which would accrue to him during that time for handling the property. Estates are not supposed to exist for the benefit of receivers and we think it was an abuse of discretion for the court to continue the receivership with the expense which would necessarily follow to the owner and the bondholders.

The order will be reversed and the cause remanded with directions to enter an order requiring the petitioner to deposit with the court such sum as the court may find would be the reasonable rental of the property during the period of redemption, and that upon such deposit being made the receiver be required to file his final account, the receivership terminated and possession delivered to the owner.

REVERSED AND REMANDED WITH DIRECTIONS.

O'Connor, P.J., and McSurely, J., concur.

title to the premises and hold the same for about 85% of the investors in the bonds secured by the trust deed. It showed that as such owner it was ready, able and willing to pay in cash a sum equal to all the rents, income and profits which would be realized during the period of redemption. On the record we cannot conceive of any reason why the petition of the owner should have been denied other than that the receiver might be deprived of the compensation which would accrue to him during that time for handling the property. Matters are not supposed to exist for the benefit of receivers and we think it was an abuse of discretion for the court to continue the receivership with the expense which would necessarily follow to the owner and the bondholders.

The order will be reversed and the cause remanded with directions to enter an order requiring the petitioner to deposit with the court such sum as the court may find would be the reasonable rental of the property during the period of redemption, and that upon such deposit being made the receiver be required to file his final account, the receivership terminated and possession delivered to the owner.

REVERSED AND REMANDED WITH DIRECTIONS.

O'Connor, P.J., and McNally, J., concur.

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

FEBRUARY TERM

A.D. 1940

306 Ill. App.
Abs. No. 2

Term No. 8 Agenda 2

| | | |
|---|---|---|
| WILLIAM MILLAS, Plaintiff Appellee | ) | Appeal from |
| | ) | The Circuit Court of |
| vs | ) | Madison County |
| GULF INSURANCE COMPANY OF DALLAS, TEXAS, Defendant Appellant | ) | |

Abstract
306 I.A. 281

STONE, P. J.

This is a suit upon an insurance policy covering personal property of appellee while contained in a two story brick building located at 409 Bell St., Alton, Illinois. Appellee occupied the first floor and the basement of this building in which he conducted a tavern and restaurant, with accessories.

The complaint contains the usual allegations of making and delivering of the policy, the payment of the premiums, two fires, out of which losses arose to the property to the extent of $1993.26, the making of the proofs of loss, and so forth. The answer denied these material allegations and in addition to the denials appellant filed affirmative defenses, one alleging in substance that the Appellee himself procured the fire to be started, the other that Appellee kept upon the premises certain gasoline in violation of one of the provisions of the policy which provides that said policy should be void if gasoline be kept or used or allowed on the above premises, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard. Appellant also set up in its affirmative defense that said policy was voided because of fraud and false swearing on the part of Appellee in connection with such incidents as called for matters under oath.

Appellee filed replication to those defenses and a trial was had resulting in a verdict for $1500.00. Motion for new trial was denied and judgment was entered on the verdict for $1500.00 and costs of suit. Appellant has perfected an appeal to this court alleging in substance that the verdict is manifestly against the weight of the evidence; that the policy was voided in two different ways,- first by the keeping of gasoline on the premises, and, second, by false swearing in connection with the proofs of loss. Appellant also claims that the court erred in admitting improper testimony offered on behalf of appellee.

In an attempt to show that Appellee procured the fires in question and that in holding otherwise is against the manifest weight of the evidence, Appellant offered and proved that the first fire occurred on January 6, 1937, about three o'clock in the morning; that this fire was in the basement, except where it burned a small hole of several inches in diameter through the flooring of the first floor, to a steam pipe; that after such fire Appellant as well as all of the other companies carrying risks on the property in question gave notice of cancellation of their policies; that said cancellation would be effective five days after January 15, 1937, the date of the notices. Appellee received the notices on January 6, 1937, and the cancellations would, therefore, be effective on January 21, 1937; that on January 20, 1937 before midnight and after the tavern had been closed for business, the second fire occurred. This fire was on the first floor, the part of the tavern where the first fire had not burned.

Harold C. Dickinson, shortly after investigation, was arrested for the burning of the property which was involved in the fires. Dickinson was not called to testify, but his wife, who was a witness for Appellant, testified that she knew Appellee and had met him on three occasions; the first was in December, 1936, at the tavern in question; that at that meeting Appellee and Mr. Dickinson withdrew from the party which witness was in and were in company alone; that on the return trip home in an automobile her husband gave her ten dollars, and that he had no money before that time; that a few days after that, Appellee called at the home of witness' aunt in St. Louis, where she and her husband then were; that Appellee talked with Dickinson and witness was present; that Dickinson asked Appellee if he had the money he had requested him to bring; that Appellee said Yes; that then and there he gave Dickinson one hundred dollars; that while they were talking she heard Appellee say something about not letting anything go wrong; that Dickinson replied that he had it all planned out and would be sure that everything came out all right; that Appellee and Dickinson were talking about candles and fuses in this conversation; that at the third meeting Appellee called at the Dickinson home in East St. Louis; that Appellee and Dickinson talked in the living room of the Dickinson home; that witness was present; that on that occasion Appellee said to Dickinson that things did not go off as he had expected and that he thought they should do it again, and her husband said he would have to have more expense money; that on this occasion Appellee gave Mr. Dickinson some money; she did not know how much.

Another witness, Al Nickols testified that he accompanied Dickinson and his wife and Mrs. Dickinson's mother on an auto trip to the Faust tavern in the latter part of December, 1936; that they were at the tavern about two hours; that while there Dickinson left the party and went in the back of the place with Appellee where the two remained together for about thirty minutes. The witness afterwards retired with Appellee and Dickinson and says that he heard a conversation to the effect that Dickinson said, "I have got quite a bit of money coming and I want Millas to substantiate that statement"; that Appellee then spoke up and said, "Yes, the boys are going to have plenty of money pretty shortly". This witness also related the incident of Dickinson giving his wife some money on the way home that evening. He spoke of other trips which Dickinson, in his knowledge, made to the Faust tavern.

These, of course, are suspicious circumstances, though many of the incidents related in making them suspicious are in themselves quite far fetched.

Opposed to this testimony both Appellee and his wife denied that they never knew or saw Dickinson until the time of the trial. Appellee, however, admitted that he knew Dickinson was in the Madison County Jail for about a year and that Dickinson was charged with the burning of his place. He says he never made any effort to see him. The evidence shows some circumstances on the other side of this question,- notably that on the night of the first fire, at three o'clock in the morning, when Appellee was apprised of the fire he hastily rushed to his place of business, went to his safe and took out $1800.00 of his own money which he had left there; that is not denied.

Thus we have what may be called very suspicious circumstances in behalf of Appellant; on the other hand we have positive denial of Appellee and his wife and the other circumstances related. Can it be doubted that this raises a clear cut question of fact as to who is telling the truth? These matters were doubtless ably presented to the jury. The evidence bearing on Appellant's claim is forcefully presented here. If the jury saw fit to believe Appellee and refused to be influenced by the suspicious circumstances of the Dickinson matter, should we decide this question of fact and say the finding of the jury is against the manifest weight of the evidence? The question in our judgment is not debatable. It was a question wholly for the jury.

The other question relied upon by Appellant next in importance if we may judge from the argument, is that gasoline was kept upon the premises in violation of that section of the policy above quoted. The facts in this

case showed that Appellee's wife kept a small vial of some petroleum product for the purpose of cleaning her finger nails; that Appellee some times kept a small amount of gasoline in his basement, never more than a gallon, sometimes half of a gallon and sometimes none. This gasoline he used to pour down a drain for the purpose of cleansing. There is no proof that at the time of the fires any gasoline was upon the premises, except that the investigators from the sheriff's office testified that they noticed the smell of gasoline or some petroleum product.

We have examined the authorities submitted on similar states of fact, notably Norwayez vs Thuringia Insurance Co. 204 Ill. 334, and Trichelle vs Sherman & Ellis Inc., 259 Ill. App. 346. Such sections in insurance policies as the gasoline one here referred to must receive a reasonable construction. It certainly was not intended that a policy of insurance covering a section as the policy here under investigation does, should be voided if a thimble full of gasoline was found to be upon the premises whether it was responsible for the fire or not. In the case of Weininger v Metropolitan Fire Insurance Company, our Supreme Court said in substance, that a policy of insurance is to be construed liberally in favor of the insured and strictly against the insurance company, and that the keeping of small quantities of gasoline or benzine on the premises for cleaning purposes does not render the policy void because it contains such a provision. In that case a small amount of gasoline was used for cleaning furs, as the small amounts in the case at bar were used for such practical purposes as made them necessary. In that case the trial court sustained a decree for something over seventeen thousand dollars. We think that that case is authority here and that on that authority we are unable to say that the small amount of gasoline which is alleged,- not proved,- to have been on the Appellee's premises, with a reasonable interpretation, should have voided the policy here in question.

The question of false swearing in connection with the proofs was presented to the jury. If they did not believe that Appellee procured the fires in question then quite naturally they would not believe that he swore falsely about not knowing the cause of the fires; one follows the other. At any rate, that was a question of fact for the jury and the jury refused to believe that Appellee had sworn falsely.

Much argument is made about the verdict here being excessive. One investigation was made by a local adjuster who fixed the amount of the losses at $14,949.46. Witnesses called by appellant fixed the losses at a figure

near eight thousand dollars. Among others who testified on this subject was one Wieland, who was the agent of the defendant and who was shown to have had a wide experience as an insurance agent. He testified that in his opinion the stock of goods was worth from eighteen thousand to twenty thousand dollars. Complaint is made of the trial court in admitting the testimony of this witness. The difference in valuation of the witnesses for appellee and the witnesses for Appellant is not so out of proportion as that we can say that Appellant was in any way prejudiced by this witness' testimony, and if it was not prejudicial than there was no harm in admitting it. (Sanquist v Hardware Mutual Fire Ins. Co. 371 Ill. 360.)

All things considered we do not find in this record any error which would justify a reversal. The judgment of the Circuit Court of Madison County is accordingly affirmed.

JUDGMENT AFFIRMED.

Abstract

STATE OF ILLINOIS

APPELLATE COURT

FEBRUARY TERM

A. D. 1940

TERM NO.12 AGENDA NO. 11

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TOWN OF CENTREVILLE,
Plaintiff-appellant

-vs-

FRANK REINHARDT,
Defendant-appellee

APPEAL FROM THE CIRCUIT COURT OF ST. CLAIR COUNTY

Abstract

306 I.A. 281

STONE, P. J.

Complaint was filed in the Circuit Court of St. Clair County, by the Town of Centreville, in St. Clair County, Illinois, hereinafter designated as the plaintiff, against Frank Reinhardt, hereinafter designated as the defendant, to recover damages for wrongfully selling and disposing of a certain Austin-Western road grader, property of said town, while the road grader was in his official possession during his incumbency in office as Highway Commissioner.

The grader in question was purchased in March, 1929, by the defendant for $3,295.00, for the Town of Centreville. On September 5, 1931, defendant sold the grader to one E. D. Epperson for $1,100.00 and turned that amount over to the treasurer of the road and bridge fund of the Township. Previous to the sale, defendant talked to the County Superintendent of Highways of St. Clair County, about selling the grader, and was told by him that he did not think it necessary for defendant to have his approval of a sale. After some needed repairs were made by Epperson, the road grader was sold by him to the Highway Commissioner of Wood River Township, in Madison County for $2,200.00.

Damages claimed by the plaintiff were the difference between what defendant turned over to the road and bridge fund, and the $2300.00 which plaintiff claimed was the market value of the machine. Upon a trial of the case, before the court, judgment was entered in favor of the defendant.

Many questions are raised by the plaintiff and relied upon as error for reversal, the most of which we do not deem

it necessary to discuss. The most of these questions seem to us to be merely abstract propositions, not necessary to be passed upon by the court in order to determine the correctness of the judgment of the lower court. The principal contention of plaintiff, relied upon for reversal is that the defendant as Highway Commissioner was merely the custodian of the road grader; that it was the property of the Town of Centreville; that defendant had no authority to sell it and having wrongfully sold it, should respond in damages for the conversion.

Considering the record as presented to us, we do not feel called upon to pass upon the question as to the authority of defendant as Highway Commissioner, to sell the road grader. If the sum of $1100.00 was a fair market value of the machine, then the question as to his right to sell it, is merely an abstract proposition.

There seems to be but very little competent evidence in the record on the question of the market value of the grader, other than the amount of the purchase price paid by Epperson, and the testimony of the witnesses Keeley and Collie, as to the degree of depreciation in the value. Market value of personal property has been defined as a price established by public sales in business, or prices dealers are willing to receive and purchasers are made to pay, when goods are bought and sold in ordinary course of trade. Commander vs.Smith 192 S.C.159,134 S.E.418. The term market value as the words fairly import, indicates price established in a market where the article is dealt in by such a multitude of persons and such a large number of transactions, as to standardize the price. Private dealings in property can never be used to show market value in the primary sense and when used to show market value in the sense of fair and reasonable value, individual transactions can never be made the sole basis for ascertaining such value. North American Tel.Co.vs.Northern Pac.R.Co.254 Fed.417,418. The objections to plaintiff's exhibit "4", and to the other testimony of the witness, McCurdy in connection therewith, was properly sustained by the court, it being an isolated transaction, not tending to show the market value of the property in question and for the further

reason that there was no showing that the road grader was in the same condition at the time of this offer, as it was at the time of its sale by the defendant.

The witness, Joseph F. Havelka, produced by the plaintiff, testified that he was the Highway Commissioner of Wood River Township, and had purchased the road grader in controversy from Epperson, after some repairs had been made upon it by Epperson, subsequent to its sale to him by the defendant. Upon his examination, he was asked what he paid for it, to which objection was sustained. Objection was also sustained to the question as to whether $2800.00 was a fair cash market value of the grader, at the time of the sale to Wood River Township. The court later said that he would let this testimony go in for what it was worth. This was an isolated transaction extrinsic to the issue involved and not calculated to prove the market value of the grader, particularly after repairs were made upon the machine by Epperson. We are inclined to believe that the original ruling of the court was the correct one. It is apparent that the court in eventually admitting this testimony did not allow it to weigh heavily in the balance on the question of the market value, as is indicated by his statement that he would let this in for what it was worth.

We feel that the court did not err in sustaining objection to the testimony of the witness, R. L. Fine, as he did not seem to be familiar with the condition of the grader at the time of the sale by the defendant.

In the final analysis, the question of the value of the road grader was a question of fact to be determined by the court. Regardless of the authority or lack of it on the part of the defendant the trial judge must have believed that $1100.00 was the market value of the road grader at the time of the sale by defendant. If so, this court would not be inclined to disturb that judgment of the lower court. The finding of the court, in trials without a jury are entitled to the same weight as a jury's verdict and will not be set aside unless manifestly against the weight of the evidence, Keefer Coal Co.vs.Electric Coal Co. 291 Ill.App.477 486; Broderick vs.O'Leary 112 Ill.App.658,661;Wood,et al vs.Price 46 Ill.435.

We find no sustantial error in the record and the judgment will be affirmed. AFFIRMED. Abstract

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

FEBRUARY TERM

A.D. 1940

ABSTRACT

TERM NO. 16 AGENDA NO. 5

A. H. SEBASTIAN,
Plaintiff-appellant

vs.

SCHOOL DIRECTORS OF DISTRICT NUMBER FIFTY THREE, COUNTY OF CLINTON and STATE OF ILLINOIS,
Defendant-appellee

Appeal from the Circuit Court of Clinton County, Illinois

306 I.A. 282

STONE, P. J.

Suit was filed in the Circuit Court of Clinton County, by appellant, a dealer in school supplies, against appellees, directors of School District Number Fifty-three, Clinton County, to recover the sum of $488.06, alleged to have been the purchase price of certain school supplies, including a furnace for the school in question. The complaint consisted of just one count alleging an express contract to purchase the merchandise sold.

Answer filed by appellees consisted of a general denial of the purchase of the goods, denial of the promise to pay the amount sued for and a specific allegation, in an amended answer, that the then Directors of the School District did not by "Yea" and "Nay" vote taken, purchase the goods set forth in the complaint; that the action of the directors was not valid, because no regular or special meeting was called and the clerk of the board did not keep an orderly or reliable record of the transaction, and that minutes of the meeting were not signed by the clerk and President; and that the sale was procured by bribery and corruption.

Upon a trial before the Court, judgment was rendered against appellant for costs of suit and the complaint was dismissed.

The appellant, A. H. Sebastian, at the time of the transaction was engaged in the sale of janitor's supplies and school equipment, and employed individual salesman to go out and sell his products to counties, cities, school districts and other governmental agencies. On March 28th, 1936, one W. L. Jackson was in his employ as such salesman and on that date sold to the School Directors of District Number Fifty-three, certain

items of merchandise. At this time, there was no regular meeting of the board, and apparently no special call by the president. One of the members, U. G. Jones was picked up at a nearby farm by Jackson, the salesman, and taken in Jackson's car to the farm of Christ Daum, another member of the board. Also there at that time at that place, was John Wilkey, another member of the board. There seems to have been no vote taken on the proposition and no recording of the transaction by the Clerk. All three members signed the order for the merchandise.

Before going to the meeting, one of the members had two drinks of liquor, which was purchased by some one not a party to this transaction and after the order was signed, had another drink from a bottle furnished either by the salesman, or a man accompanying him, and one other member had a drink, after he signed the order. Among the articles purchased for use at the school was a furnace. It seems to have been understood that the school district was to be allowed a credit of $15.00 as the trade-in value of the old furnace. Apparently Jackson did not want the furnace and after all the members had signed the order, wrote a note, to the effect that the furnace man was to deliver it to the second house east of the school house - a little yellow house, which was where U. G. Jones, one of the directors lived.

The goods were all delivered to the school and used by it, and were never paid for.

Appellant contends that the meeting at which the goods were purchased was attended by all of the members and that a legal contract was there entered into between the parties; that school district received and used the goods and were estopped to deny the regularity of the meeting at which the goods were purchased. It is also contended on the part of the appellant that there should have been a judgment upon a quantum meruit, for the reasonable value of the property.

For the appellee, it is maintained that there was no legal contract, because of the irregularity of the meeting; that the doctrine of estoppel does not apply because of the fact that the school directors were public officers, and that because of bribery and corruption, the sale was void ab initio.

Among the powers given school directors by statute are the following, "to repair and improve school houses and furnish them with the necessary

fixtures, furniture, apparatus, libraries and fuel." Chapter 122, Section 123, Par. 7, Illinois Bar Stats, 1939. The statute also provides in the same chapter, that no official business shall be transacted except at a regular or special meeting, that the clerk shall keep a record of the official acts of the board, and on all questions involving the expenditure of money the "yeas" and "nays" shall be taken and entered on the records of the proceedings of the board.

There can be hardly any question but what the meeting and action of the school directors was not in compliance with the statute. The three directors testified as witnesses both for the appellant and appellee, and at no time during the trial in the lower court was there any claim that this was a regular meeting of the board, or that it was a special meeting at the call of the president; no vote was taken and the "Yeas" and "Nays" were never recorded by the clerk. It has been repeatedly held that such meetings of the directors of a school district are invalid and that the provisions of the statute, with reference thereto are mandatory. Shortal v. School Directors etc. 255 Ill. App. 89; Board of Education Villa Grove Township High School Dist. No. 231 v. Barracks, 235 Ill. App. 35; Scanlan v. Board of Directors, 245 Ill. App. 357; The People ex rel. Clark v. B. & O. S. W. R.R. 353 Ill. 492-499; Kimmel v. Board of Education District No. 52, 244 Ill. App. 257.

The evidence shows that this property was sold in March of 1936, was to be paid for in one year, that it was delivered to and accepted by the school district, and used by the school since that time, and never paid for. School districts are quasi-municipal corporations. Fiedler vs. Eckfeldt 335 Ill. 11; Melin vs. Community Cons. School District No. 76 312 Ill. 376, People vs. Paris Union School District Board of Education 255 Ill. 568. It is the well settled law in Illinois that the doctrine of estoppel may be invoked as against municipal corporations, where the contract was not ultra vires and performed in good faith by the other contracting party. Westbrook vs. Middlecoff, 99 Ill. App. 327; McGovern vs. City of Chicago 218 Ill. 264, Avery vs. City of Chicago, 345 Ill. 640. In the case of Barnard and Co. vs. The County of Sangamon 190 Ill. 116 the doctrine of estoppel was invoked as against a county, a quasi-municipal corporation, when it was acting in its private as distinguished from its governmental capacity. Unquestionably the school directors had the power under the statute to purchase the goods in question. Said goods were delivered to and used by the school for at

least three years, before suit was brought. We are inclined to hold that the school directors were acting in a private, rather than a governmental capacity, and that they are estopped to set up the irregularity of the proceedings by which the goods were bought. To not so hold, and to not assert the doctrine of estoppel would be to cause appellant a substantial loss. A municipal corporation or a quasi municipal corporation, no more than an individual, cannot profit by its wrongful acts.

It is strenuously contended by the appellees that the contract was void ab initio, because it was induced by bribery and corruption. We find no convincing evidence of this. The witness Wilkey, one of the directors, testified that he had several drinks which were purchased for him by another party in no way connected with this transaction, before he came to the meeting and that he got a drink after he signed the order; that another member had a drink after he signed the order. There is no evidence in the record that this influenced them in signing the order for the goods. The salesman, Jackson, allowed the directors a credit of $15.00 on the old furnace; he did not want it, and gave directions that it was to be delivered at the home of U. G. Jones, one of the directors. Jones testifying for the appellees, said that he did not know, at the time he signed the order that he was going to get the stove. Under this state of the record, it could hardly be said that the drinks or the gift of the furnace influenced the sale or brought it about, so that the charge of bribery is unfounded.

For the reasons above stated the judgment of the lower court will be reversed and remanded, with directions to the Circuit Court of Clinton County to enter a judgment in favor of appellant in the sum of $488.06 and costs of suit.

REVERSED AND REMANDED WITH DIRECTIONS.

Abstract

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

February Term, A.D., 1940

Abstract

Term No. 5. Agenda No. 10.

| | | |
|---|---|---|
| MINNIE ANDREWS, Administratrix of the Estate of FRANK L. ANDREWS, deceased, Appellant, vs. ASA MATTESON and CHARLES W. HENNINGER, Appellees. | ) | Appeal from County Court of Fayette County. |

306 I.A. 282

CULBERTSON, J.

This is an appeal from an order of the County Court of Fayette County, Illinois, vacating a judgment previously entered by confession, and allowing one of the Appellees, Charles W. Henninger, to file an Answer therein. The Appellant, Minnie A. Andrews, Administratrix of the Estate of Frank L. Andrews, was substituted as Plaintiff in the cause upon the death of Frank L. Andrews, in whose favor judgment in the sum of $752.50 had theretofore been entered.

On August 7, 1934 Frank L. Andrews (since deceased), obtained a judgment by confession in the sum of $752.50 in the County Court of Fayette County, Illinois, against Appellees, Asa Matteson and Charles W. Henninger (hereinafter called Defendants). Execution was issued thereafter in 1935, but was not served on the Defendants. On August 20, 1935, Defendant Charles W. Henninger filed a Motion in the County Court of Fayette County to re-docket the cause, and to set aside and open up said judgment so as to permit him to file his Answer. An Affidavit of said Defendant was filed

in support of said Motion, and a Counter-Motion and Affidavits were filed by the Appellant, Minnie W. Andrews, Administratrix of the Estate of Frank L. Andrews (hereinafter called Plaintiff). A hearing was had on the Motion of Defendant, and the Court entered an Order allowing the Motion of Defendant, vacating the judgment, and permitting Defendant to file an Answer in said cause. The Answer was duly filed. Thereupon Appellant filed her Notice of Appeal, and prosecutes this Appeal from the Order of the Court in allowing the Motion of the Defendant hereinabove referred to. The Defendant, Charles M. Henninger, in opposition to such Appeal, contends in this Court that the Order opening up the judgment and permitting Appellee to plead is not appealable, and it is upon consideration of such contention that this Appeal must be disposed of.

Appeals lie only to review final judgments, orders, or decrees, of inferior courts, except as to certain designated interlocutory orders or decrees in specific cases (1939 ILLINOIS REVISED STATUTES, Chapter 110, Section 202; McGIN v. GLATZ, ET AL., 287 Ill. App. 44. This case does not fall within any of the exceptions enumerated in the Act, or in the Rules of this or of the Supreme Court. It has consistently been held, as is stated in FARMERS BANK OF NORTH HENDERSON v. STEINFELDT, 258 Ill. App. 428, at 429, "An Order opening up a judgment by confession and granting leave to plead is not a final order, but merely interlocutory, and is not appealable (DEAN v. GERBACH, 34 Ill. App. 233; TALKER v. OLIVER, 63 Ill. 199; BOLTON v. McKINLEY, 22 Ill. 203, 204; ANDREAS & CO. v. ANCHOR FOLDING BOX MFG. CO., 210 Ill. App. 636; CITY OF Park RIDGE v. MURPHY, 258 Ill. 365)."

The Supreme Court of this State in the case of BAILEY v. CONRAD, 271 Ill. 294, at 295, correctly summarizes the Rule to be applied in determining whether or not an Order is final and appealable when it says, "There must be a final order or decree in a chancery suit, or a final judgment in an action at law, to justify an appeal or writ of error. (MAYES v. CALDWELL, 5 Gilm. 33; HUNTER v. HUNTER, 100 Ill. 519; SMITH v. DELITT, 244 id. 75). A final judgment is one that finally disposes of the rights of the

parties, either upon the entire controversy or upon some definite and separate branch thereof. (MUTUAL RESERVE FUND LIFE ASS'N v. SMITH, 169 Ill. 264; CITY OF PARK RIDGE v. MURPHY, 258 id. 365.) Where a defendant moves to set aside a default and vacate a decree in order to allow a defense, and such motion is denied, the order is final and may be reviewed by an appeal or writ of error, but when the motion is allowed and the judgment is set aside merely for the purpose of allowing the party to plead or interpose a defense the order is interlocutory and an appeal or writ of error will not lie therefrom. (WALKER v. OLIVER, 63 Ill. 199; CITY OF PARK RIDGE v. MURPHY, supra; CRAMER v. COMMERCIAL MEN'S ASS'N, 260 Ill. 516.) In such case the court does not finally determine the rights of the parties. If the opposite party desires to question the action of the court in vacating a judgment, it is his duty to .... assign error thereon as a part of the record, after the controversy has been finally determined. PEOPLE v. BELLS, 255 Ill. 450." The principles stated in such case apply equally to the matter here before the Court.

Under Rule 26, adopted by the Supreme Court of this State, (1939 ILLINOIS REVISED STATUTES, Chapter 110, Section 259.26), the procedure upon a Motion to open up a judgment by confession is specified in detail. It is therein provided that if, on the hearing of such motion, it shall appear that the defendant has a defense on the merits to the whole or part of plaintiff's demand, and that he has been diligent in presenting his motion to open such judgment, the Court may sustain the motion and the cause thereafter proceeds to trial. It is expressly provided that the original judgment shall stand as security, and that all further proceedings thereon shall be stayed until further order of the Court.

The abstract of record herein shows merely a brief docket entry to the effect that the Motion to re-docket the cause, and the Verified Petition to Vacate or Open up Judgment, and to allow Defendant Charles W. Henninger to plead "allowed, judgment vacated, and Defendant allowed to file Answer". The County Court was apparently attempting to comply with the Rule established in the

parties, either upon the entire controversy or upon some distinct
and separate branch thereof. [illegible]
[illegible], 160 III. 596; [illegible]
where a defendant [illegible]
in order to [illegible]
in first and [illegible]
when the [illegible]
the purpose [illegible]
the order [illegible]
the therefore. [illegible]
[illegible]
in such case [illegible]
the jurisdiction [illegible]
of the [illegible]
error [illegible]
been filed; defendant [illegible]
jurisdiction [illegible]
[illegible]
[illegible]
[illegible]
proceeding [illegible]
[illegible]
[illegible] of such [illegible]
[illegible]
[illegible]
[illegible]
[illegible]
[illegible]
[illegible]
court.
[illegible]
[illegible]
[illegible] to [illegible]
[illegible]
and [illegible]
[illegible]

Supreme Court relating to confession of judgment hereinabove referred to, and in permitting Defendant to file his Answer, the Court was not in any manner acting to finally adjudicate the rights of the parties.

Appeals should not be taken piecemeal, and there is no basis for an appeal from an Order of a Court granting leave to plead where judgment by confession has been taken, unless there is some special showing that some wrong or injury would result from a refusal to review the case at such time rather than after an adjudication of such case on the merits. No such showing is made in the instant case. Opening up a judgment does not destroy it. Although the use of such expression is not to be recommended, the fact that the word "vacate" has been used by the Court below, does not indicate that anything other than an "opening up" of such judgment has been effected thereby. A similar conclusion has been reached in the case of FARMERS BANK OF NORTH HENDERSON v. STENFELDT, supra, at 430.

Some emphasis is placed by Appellant upon the case of CRAMER v. COMMERCIAL MEN'S ASS'N, 260 Ill. 516, in which the Court was considering the effect of an order granting a motion in the nature of a writ of error coram nobis, as an order on such motion relates to appealability. The principles set forth in such case apply only to a motion of the character therein described, and the action of the Court therein has not been construed as a precedent in determining the appealability of orders allowing motions to open up judgments by confession.

Courts hesitate to establish arbitrary rules relating to appealability of orders of a lower court for the reason that all cases must be considered in the light of the particular facts and circumstances to determine whether some action has been taken by the Court which is of such character as to be final, and consequently, appealable, as in FARMERS BANK OF NORTH HENDERSON v. STENFELDT, supra, herein referred to. This Court feels that there is nothing in the present case which at this stage of the proceeding requires a determination of the propriety of the Order opening up the judgment by confession, and the Court expresses no opinion thereon

at this time. If the Appellant desires to question such action of the Court, she may assign error thereon after the cause has been finally determined on the merits in the Court below.

The specific contention has been advanced in this Court, as hereinabove referred to, that the action of the Court below which is before this Court for consideration, is not now appealable, but even if such contention were not made, as was stated in the case of PRANGE v. MARION, 297 Ill. App. 353, where an appeal is taken from an Order which is not final, the Reviewing Court is without jurisdiction to entertain it, and such authority cannot be conferred by consent or acts of the parties, and that the Appellate Court, (at page 357) "Is bound on its own motion to dismiss the appeal though Appellee fails to move for the same."

We must, therefore, conclude that the Order complained of is not final, and that this Court is without jurisdiction to review it, and is, accordingly, obligated to dismiss the appeal.

Appeal dismissed.

Abstract

at this time. If the appellants desire to question such action of the Court, they may assign error thereon [illegible] been finally determined on the merits in the [illegible].

The specific contention has been [illegible] as heretofore referred to, upon the action [illegible] which is before this court [illegible] consideration, is [illegible] but even if such contention [illegible], as was [illegible] in the case of [illegible], [illegible], where [illegible] taken from [illegible] without jurisdiction [illegible] be conferred [illegible] Appellate Court. [illegible] dismissed [illegible].

[illegible]

of is not final, [illegible] review it, [illegible].

[illegible]

[illegible]

(b)
306 a. 283
95-40

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 7th day of May, in the year of our Lord one thousand nine hundred and forty, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice
Hon. BLAINE HUFFMAN, Justice
Hon. FRANKLIN R. DOVE, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff

306 I.A. 283

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BE IT REMEMBERED, that afterwards, to-wit: On [illegible] the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

GEN. NO. 9540 AGENDA NO. 4.

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MAY TERM, A.D. 1940.

| | | |
|---|---|---|
| GERHARD HABBEN, Plaintiff-Appellant, | ) | |
| vs. | ) | APPEAL FROM CIRCUIT COURT OF IROQUOIS COUNTY. |
| VERN ROBERTSON, Defendant-Appellee. | ) | |

WOLFE, -- P. J.

The plaintiff, Gerhard Habben, started suit in the Circuit Court of Iroquois County, against Vern Robertson to recover damages he claimed he sustained by reason of the negligence or wilful and wanton misconduct of the defendant. The plaintiff, in his complaint, alleges that the defendant was driving his car on Route 45, a paved highway and that the plaintiff was riding his motorcycle on said highway, and following the defendant; that the defendant, without any warning, suddenly slackened the speed of his automobile so that the plaintiff was compelled to drive his motorcycle to the left to avoid striking the defendant's car, and in doing so, he collided with another car approaching them; and because of the collision he suffered injuries which made it necessary to have one of his legs amputated.

The defendant filed his answer in which he denied all negligence and wilful and wanton misconduct. The case was tried before a jury and two special interrogatories were tendered by the plaintiff for the jury to answer. The first, "Was the defendant, Vern Robertson,

operating the automobile in his possession, in a wilful, wanton and reckless manner, at the time and place set forth in plaintiff's complaint?" And second, "Was the plaintiff, Gerhard Habben, at and just prior to the collision shown by the evidence, exercising ordinary care for his own safety?" After the instructions had been given and the interrogatories submitted, the jury retired and deliberated for several hours. The Court, on his own motion, recalled the jury and gave them the following instruction: "The Court instructs the jury that in your deliberations you should listen to the arguments of each other so far as based upon the evidence in the case and the law as given you in instructions given you by the Court and you should make an honest and conscientious effort to reach an agreement." The jury again retired and by their general verdict, found the issues in favor of the defendant. They answered, "No," to the special interrogatory as to whether the defendant was guilty of wanton misconduct and "Yes," to the interrogatory as to whether the plaintiff was in the exercise of due and ordinary care. The plaintiff entered a motion for a new trial, which was overruled. The Court entered judgment on the verdict of the jury in favor of the defendant, and dismissed the suit at the plaintiff's cost. It is from this judgment that the appeal is prosecuted.

The evidence is uncontradicted that the defendant and a friend of his were driving along the hard road in his automobile, and that he had passed several young men, including the plaintiff, riding on motorcycles; that as he drove down the road he slackened his speed and that two of the motorcycles passed his automobile; that as the plaintiff attempted to pass the defendant's automobile, he collided with a car driven by Leroy Pfund, and the plaintiff was injured. The only disputed question of fact, relative as to how the accident

occurred, is whether the defendant suddenly decreased the speed of his automobile without giving any warning of his intention so to do. The plaintiff and one of his witnesses claim that the defendant did so decrease his speed without giving any warning of his intention so to do. The plaintiff's testimony shows that he was following the car on his motorcycle within twenty-five to thirty feet.

The defendant does not claim that he gave any warning of his intention to decrease his speed. He and the friend who was with him strenuously deny that he did so decrease his speed. The defendant claims that he decreased his speed slightly, as one of the motorcycles was passing his car. He did this in order that the motorcycle might get around him without colliding with the Pfund car, who was approaching him in the other lane of traffic. On this disputed and material issue of fact, the jury have found in favor of the defendant. From and examination of the evidence, as shown by the abstract and record, it is our conclusion that the jury's finding is in accordance with the weight of the evidence.

It is insisted by the appellant that the Court, in giving the first five instructions for the plaintiff, failed to mark them "given," and that this was prejudicial error and mislead the jury. We find no merit in this contention, as the case of People vs. Duzan 272 Ill., 478 holds that failing to mark instructions "given," is not reversible error.

Complaint is made in regard to the defendant's 11th given instruction in that it contains the words, "Requires the plaintiff to make out and establish his case by a preponderance of all of the evidence," and that it placed a greater burden on the plaintiff than the law requires. An examination of the instruction, as set forth in the

abstract, discloses that the appellant is in error in regard to the 11th instruction of the defendant as containing such language. The words "make out and establish his case by a preponderance of all of the evidence," are not used in the 11th given instruction of the defendant. The plaintiff contends that the 11th, 13th and 14th instruction, given on behalf of the defendant, use the word "accident" in a conspicuous manner, and that the same is misleading and confusing to the jury, and gave them the impression that the Court thought that the collision was an accident and no liability on the part of the defendant. We cannot agree with the appellant that these instructions would so mislead the jury.

The plaintiff also contends that his refused instructions, as shown in the abstract on pages 52 and 53, were proper and should have been given. It has long been the rule of this Court and other Courts of appeal that a point raised, but not argued, is considered waived, and therefore the Court will not consider it. It is also the rule that instructions which are criticized and alleged to have been erroneously given, or refused, should be copied in the brief and argument so the Court will have them without having to look at the abstract to find what the instruction is.

It is now strenuously insisted that the Court erred in recalling the jury, and giving the additional instruction. We do not think it was error for the Court to do this. The instruction expresses the law. On Page 154 of the record we find the following: "Court: On the Court's own motion, I am going to give the jury this instruction. Mr. Smith: (Reads instruction.) We have no objections. Mr. Bell: (Reads instruction.) Counsel for the defendant objects to the reading of the instruction. Mr. Bohn: (Reads instruction.) I also object."

It is seen by this record that Mr. Smith, one of the attorneys for the plaintiff, informed the Court before the instruction was read, that he had no objection to the Court reading the instruction to the jury, but the defendant's attorneys did object and so stated to the Court. The plaintiff, after informing the Court that he had no objection to the calling of the jury and reading the instruction as given, cannot now be heard to say that he was prejudiced thereby. After considering all of the instructions given to the jury by the Court, it is our conclusion that they were fairly and impartially instructed.

We find no reversible error in the case, and the judgment of the trial court is affirmed.

Affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

*Clerk of the Appellate Court*

9548

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 7th day of May, in the year of our Lord one thousand nine hundred and forty, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice
Hon. BLAINE HUFFMAN, Justice
Hon. FRANKLIN R. DOVE, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WEITER, Sheriff

306 I.A. 233 2

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BE IT REMEMBERED, that afterwards, to-wit: On [illegible] 1940 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

GEN. NO. 9548 AGENDA NO. 16.

IN THE

APPELLATE COURT OF THE

STATE OF ILLINOIS

SECOND DISTRICT

MAY TERM, A. D. 1940.

| | |
|---|---|
| HERBERT C. WHITMAN, Plaintiff-Respondent, vs. ARTHUR B. COOK, Defendant-Petitioner. | Appeal from Circuit Court, Knox County, Illinois. |

WOLFE,--P. J.

This is a suit by the plaintiff to recover damages he sustained in an automobile accident. The issues were submitted to the jury, which returned a verdict of not guilty, for the defendant. A motion for a new trial was sustained, and a new trial ordered and from that order leave was granted defendant to appeal to this Court.

The plaintiff's declaration charged that he was riding as a guest in the car of the defendant, and through the wilful and wanton misconduct of the defendant in the operation of his car, he was injured and sustained damages. The evidence discloses that on the morning of June 27, 1937, between four and four-thirty a.m. the defendant was driving his Plymouth two door sedan accompanied by his daughter and her two minor children, and the plaintiff; that they left Mataga for Piper City which is approximately 90 miles East of Peoria, Illinois; that the car was being driven by the defendant on a hard-surfaced paved road; that as the car rounded a curve in the Village of Victoria, it

CRIM. NO. 9548 [illegible]

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IN THE

[illegible] COURT OF THE

STATE OF [illegible]

SECOND DIVISION

[illegible] A. D., [illegible]

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[illegible] ,
Plaintiff-Respondent,

vs.

[illegible] ,
[illegible] ,
[illegible] .

ARTHUR P. [illegible] ,
Defendant-Appellant.

---

[illegible]--- C.

[illegible] in [illegible] wilful [illegible] for a new trial [illegible] order leave was granted [illegible] .

The [illegible] guest in the car of the [illegible] misconduct [illegible] injured [illegible] day of June 27, 1937, [illegible] was driving his [illegible] and her two minor children [illegible] for higher [illegible] that the car was being [illegible] road; that as the car [illegible] [illegible]

ran off of the shoulder and overturned and injured the plaintiff. The evidence tends to show that the car was being driven at approximately 50 to 55 miles per hour. The plaintiff claims that he remonstrated with the defendant as to the excessive rate of speed at which the defendant was driving. The defendant denied that plaintiff said anything regarding the speed, and in this he was corroborated by his daughter.

The appellant contends that the reason the trial court granted a new trial was because of the giving of the defendant's instruction No. 18. There is nothing in the record that sustains this contention. If the Court made such an announcement, we are unable to find it anywhere in the record. The form of this instruction has been criticized in many cases, but in some cases it has been approved. It depends wholly upon the facts as developed in each particular case, as to whether it is applicable. In the present case it seems to us that there are facts that justify the giving of this instruction.

When the abstract does not contain the statement of the trial court as to why he granted a new trial, it is impossible for this Court to know his reasons for doing so. It may be that the Court was of the opinion that there had been error in the admission of evidence, or that he had inadvertently given erroneous instructions to the jury, or that the verdict of the jury was contrary to the weight of the evidence. The matter of the trial court granting a new trial is very largely discretionary with the trial judge. Unless that discretion has been clearly abused, a reviewing Court will not set that order aside.

The appellees contend that defendant's given instruction No. 14, which defines wilful and wanton misconduct, is erroneous. We are

[illegible] off of the shoulder and [illegible] the plaintiff.
The evidence tends to show that [illegible] approximately
mately 20 to 25 [illegible] feet. [illegible] to [illegible]
attended with the defendant [illegible] in
the determination [illegible]
anything regarding the case, [illegible]
damages.

The appellant contends [illegible]
a new trial and [illegible]
No. 12. There is [illegible]
If the Court [illegible]
where in the [illegible]
in many cases, but in [illegible]
wholly upon the [illegible]
whether it [illegible]
there was [illegible]

When the [illegible]
court to [illegible]
Court to [illegible]
was [illegible]
evidence, [illegible]
to the [illegible]
weight [illegible]
[illegible]
but [illegible]
[illegible]

[illegible]
which [illegible]

inclined to believe that this instruction does not contain the full law in regard to wilful and wanton misconduct. The instruction directs a verdict and it should include every element relative to such conduct. The instruction in the form it is given, does not properly state the law.

Complaint is made that a large number of the instructions given on behalf of the defendant conclude by stating that under certain circumstances, the jury should find the defendant not guilty. This practice has been condemned in a number of cases, (Daubach vs. Drake Hotel Company 243 Ill., App. 298.) The trial court in considering the motion for a new trial, no doubt reviewed the evidence and whether the verdict of the jury was supported by the greater weight of the evidence. It was his providence to hear and observe the witnesses as they testified. He may have concluded that the verdict was not supported by the evidence, and for this reason granted a new trial. We do not intend to state on which side, in our opinion, the evidence preponderates, but the Court has seen fit to grant a new trial. From a review of the whole case, it is our conclusion that the trial court did not abuse his discretion in granting a new trial. The order appealed from will be affirmed.

Affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

_____
*Clerk of the Appellate Court*

9553

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 7th day of May, in the year of our Lord one thousand nine hundred and forty, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice
Hon. BLAINE HUFFMAN, Justice
Hon. FRANKLIN R. DOVE, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff

306 I.A. 284

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BE IT REMEMBERED, that afterwards, to-wit: On [illegible] 1949 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

GEN. NO. 9553 AGENDA NO. 10.

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MAY TERM, A. D. 1940.

| | | |
|---|---|---|
| WHITAKER FARMERS GRAIN CO., a Corporation, Plaintiff-Appellee, | ) | Appeal from Circuit Court, Will County. |
| vs. | ) | |
| JOSEPH SOUCIE, Defendant-Appellant, | ) | |

WOLFE,--P.J.

The Whitaker Farmers Grain Company, a corporation, started a suit before a justice of peace against Joseph Soucie. The trial resulted in a judgment for the plaintiff in the sum of $231.05. The defendant appealed the case to the Circuit Court of Will County, and it was tried before the Court on November 28, 1935, without a jury. The trial court found in favor of the plaintiff and rendered judgment against the defendant in the sum of $231.05, and it is from this judgment that the appeal is prosecuted.

There are no written pleadings by which the Court can decide the theory on which the case was tried. It is insisted by the appellant that the case was tried on the theory that it was an 'open account,' and therefore the evidence introduced by the plaintiff was inadmissible. The appellee contends that the case was tried on the theory of an

'account stated,' and therefore the evidence introduced in evidence is admissible. The plaintiff at the trial introduced in evidence Mr. Ben Maass, the Managing Officer of the Whitaker Farmers Grain Company, who identified the records of the Company, and over the objection of the defendant, the same were introduced in evidence. The same witness testified that he had repeatedly sent statements of the account to the defendant, Joseph Soucie, showing that there was a balancedue from Soucie to the plaintiff of $231.05.

Mr. Herman Langhorst testified that he was a Director and Secretary of the plaintiff Grain Company, and that he was acquainted with the defendant, Joseph Soucie, and had talked with him about the subject matter of the suit in January 1936; that he went to see the defendant in company with Mr. H. M. Schraeder, and they went for the express purpose of seeing Mr. Soucie about the bill that he owed the plaintiff company, and to see if they could get him to pay it. He testified that he talked to the defendant about the bill and Soucie told them 'he couldn't pay it just now.' The witness testified that Mr. Soucie acknowledged that he owed the bill and he said, "I know what you are here for; I will treat you white and pay as soon as I can." The witness further testified that later in the presence of Mr. Robert Hammann, he discussed the same matter with Mr. Soucie at his home; that he asked the defendant for the amount of the bill and if he would do anything about it, to which the defendant replied, "Treat me white and true and I will do something." The witness then stated the amount of the bill to be $231.05, to which the defendant acknowledged the amount of the bill and said, "All right." The defendant further replied, "That he would pay, but he had some cattle he wanted to sell and when he sold them, he would give some of it to

'account stated,' and therefore the evidence [illegible] is admissible. The plaintiff at the trial [illegible] Mr. Ben Mazes, the [illegible] Company, who identified the records of the [illegible] objection of the defendant, who [illegible]. The same witness testified that the [illegible] of the account to the defendant, [illegible] was a balance from Bonds to the plaintiff [illegible].

Mr. [illegible] testified [illegible] Secretary of the plaintiff [illegible] with the defendant, through [illegible] subject matter of the suit in [illegible] defendant's company with [illegible] expense purchase of [illegible] plaintiff company, [illegible] testified that [illegible] told them "[illegible]." The witness testified that Mr. Bonds acknowledged [illegible] what [illegible] on." The witness further [illegible] Mr. Robert H. Mazes, [illegible] his money; [illegible] if he would [illegible] "Just me write you here and I will [illegible]." [illegible] stated the amount [illegible] acknowledged the [illegible] defendant further [illegible] he wanted to sell [illegible]

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us if he could in May." He further testified he saw him later at the defendant's barn, while he was milking, and the defendant told him that he would like to sell him some bulls, and the witness replied, "He had no authority from the company to buy bulls."

Mr. Robert B. Hammann testified that he was a farmer residing in Kankakee County, and a Director of the Whitaker Farmers Grain Company, and had been for the past six or seven years; that he knew the defendant, Joseph Soucie, and had a conversation with him in January 1936, in company with Mr. Langhorst. He testified that they discussed the subject matter of the lawsuit with the defendant and one of them asked him what he was going to do about the bill, to which the defendant replied, "Well, I will treat you white and take care of you; that he couldn't take care of all of it at once, but he would take care of it; that he had some cattle ready to sell, and the following May he would try to pay on some of it; that he would treat us white and take care of it as soon as he could;" that the amount of the bill was mentioned as $231.05; that Mr. Soucie did not dispute the amount of the bill.

From a review of the case, it seems to us that it is clearly established that it was tried upon the theory of an account stated, and that the rulings of the trial court on the admission of evidence were proper. Whether there was an account stated and agreed upon between the plaintiff and the defendant, was a question of fact to be decided by the trial court. In the case of Shane vs. DeLeon 258 Ill. App. 433, this Court had occasion to state the law relative to the questions involved in this suit, and there we used this language: "The meeting of the minds of the parties upon the correctness of an account stated is usually the result of a statement of account by one party and an acquiescence therein by the other. The form of the

acquiescence or assent is, however, immaterial, and may be implied from the conduct of the parties and the circumstances of the case.**** Still, in order to constitute an account stated, there must in every case be proof in some form of an assent to the account, that is, a definite acknowledgment of the indebtedness in a certain sum, and the assent must be voluntary. As a general rule any admission of a balance or acknowledgment made by one party to another that a sum is due to the later is sufficient prima facie evidence to prove an account stated."

In the present case it is undisputed that the plaintiff on several occasions sent a statement of account to the defendant who never disputed the amount as claimed to be due in the statement and that he acknowledged that he owed the debt to two of the officers of the plaintiff company. We think that the trial court properly found that there was an account stated and accepted to be true by the parties to this suit.

The only defense relied upon by the defendant is that of the Statute of Limitations, namely, that the debt accrued more than five years prior to the commencement of the suit. There might be some merit in the appellant's contention if this was a suit upon the original account, but even then, we think the acknowledgment of the debt and the promise to pay the same within the five year period, would take it out of the Statute of Limitations. The judgment of the trial court should be and is affirmed.

Affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

_____
*Clerk of the Appellate Court*

9361

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 7th day of May, in the year of our Lord one thousand nine hundred and forty, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice
Hon. BLAINE HUFFMAN, Justice
Hon. FRANKLIN R. DOVE, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WEITER, Sheriff

306 I.A. 284²

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BE IT REMEMBERED, that afterwards, to-wit: On [illegible] 1940 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

GEN. NO. 9561 AGENDA NO. 15

IN THE APPELLATE COURT OF ILLINOIS,

SECOND DISTRICT

MAY TERM, A. D. 1940,

| | |
|---|---|
| WILLIAM MAYZAK, Appellee, vs. EDWARD J. MEYERS COMPANY, a Corporation, Appellant. | APPEAL FROM CIRCUIT COURT LAKE COUNTY. |

HUFFMAN - J.

Appellee brought this suit against appellant to recover for damages to his automobile arising out of a collision which occurred on March 29, 1939, with one of appellant's trucks. The accident happened at about seven o'clock in the evening. It was snowing and the snow was melting as it reached the pavement, thus rendering the same wet and slippery. Appellant's truck was proceeding west upon the state highway in question. Appellee was travelling in the same direction. Appellant's truck was stopped on the highway about one hundred fifty feet from the top of a hill. Appellee drove his car over the crest of the hill and started down toward the place where appellant's truck was stopped. His lights apparently did not disclose the position of appellant's truck until he had travelled from the top of the hill a distance of about seventy-five feet, at which place he then discerned for the first time appellant's truck stopped on the pavement. He applied the brakes to his car. Although

the motion of his car was checked, yet he was unable to bring the same to a full stop, due to the condition of the pavement. The result was that his car collided with the rear of appellant's truck, thereby sustaining certain damages. The jury returned a verdict for appellee in the sum of $250. Appellant prosecutes this appeal from the judgment rendered thereon.

Shortly prior to the time appellant's truck had reached the place in the pavement where it was stopped, a car which had been preceding it, had skidded off the pavement and was stuck in the mud at the side of the road. The two drivers of appellant's truck observed this car in the ditch on the north side of the pavement, brought their truck to a stop on the pavement in the traffic lane in which they were travelling, and went to investigate the car that was in the ditch. The drivers of appellant's truck set about to try and remove the car from the ditch by connecting chains from the truck to the other car. During the process of these efforts, appellee came over the hill and the collision between his car and the rear of appellant's truck occurred, as above stated.

Appellants urge that appellee was guilty of contributory negligence in that he was not exercising such a degree of care as could be considered commensurate with the condition of the weather and the highway, immediately prior to and at the time of the accident. Appellee replies to this point by urging that he was in the exercise of such care and was in no way guilty of contributory negligence, but that appellant was guilty of negligence in stopping its truck upon the highway in the above manner, and thus blocking appellee's traffic lane, when no emergency was shown to have existed which compelled appellant's truck to be so stopped. It is not claimed that the drivers of the truck placed any flares upon the highway, but one of the drivers claims that he was standing behind the truck with a flashlight.

the motion of his car was checked, yet he was not in [illegible] the same to a full stop, due to the condition of [illegible]. The result was that his car collided with the rear of [illegible] thereby sustaining certain damages. The [illegible] appellee in the sum of $25.. [illegible] the judgment rendered [illegible].

Shortly prior to the time [illegible] place in the pavement where it was [illegible] preceding it, had [illegible] at the side of the road. [illegible] served this car in the ditch [illegible] brought their truck to a stop [illegible] in which they were travelling. [illegible] was in the ditch. The drivers of the [illegible] try and remove the car from the ditch by [illegible] truck to the other car. [illegible] came over the hill [illegible] of [illegible] signalled to turn [illegible].

[illegible] fence in that he was not [illegible] be complicated [illegible] highway, but [illegible] Appellee testified to this point [illegible] of such care [illegible] that appellant was [illegible] highway in the clear [illegible] lane, when no [illegible] appellant's truck [illegible] of the truck [illegible] claims that he was [illegible]

No general definition of negligence can be of much value in the practical administration of justice. The reason for this is that there are so many qualifications due to varying circumstances connected with accidents of this character, that a general definition leaves too many things undefined. No definition of negligence can be accurate which does not refer to the degree of care demanded of the persons sought to be charged, under the circumstances and surroundings of the particular case. However, an essential ingredient in any conception of negligence is that it involves the violation of a legal duty, which one person owes to another. Nothing appears in the record to indicate that appellee was driving his car in a reckless or careless manner. The evidence is, he was operating his car about thirty miles an hour; that his headlights were on; that the windshield wipers were in good order and operating; that as soon as he came over the hill and saw appellant's truck on the pavement blocking his traffic lane, he applied his brakes in an attempt to stop, whereupon his car continued to slide on the snow and slush, and collided with the rear of appellant's truck. It appears that at the time of the collision, the truck was at an angle across the pavement, due to a series of attempts to pull the other car out of the ditch. The impact does not appear to have been with much force; no one appears to have been injured; and appellee's headlights appear to have been burning after the accident. It would appear that the proximate cause of the collision was the blocking of the pavement by appellant's truck, because without such act, no collision would have occurred. The questions before the jury were whether appellant was negligent, and if appellee was free from contributory negligence. These were questions of facts.

The court and jury have superior advantages over a court of review in such respect. These considerations have led to the adoption of the rule that where the evidence by fair and reasonable intendment will authorize the verdict, a court of review will not disturb the same, unless it clearly appears that the verdict is contrary to the weight of the evidence. These rules are so well established that we do not consider a citation of authority necessary. We find no reversible error in the record. It must be remembered that what is termed ordinary care in the consideration of contributory negligence, is not an absolute, but a varying circumstance, depending upon the facts in the particular case. In this case we are not disposed to disturb the verdict. The judgment of the trial court is therefore affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
*Clerk of the Appellate Court*

(73947) 7

9567

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 7th day of May, in the year of our Lord one thousand nine hundred and forty, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice
Hon. BLAINE HUFFMAN, Justice
Hon. FRANKLIN R. DOVE, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff

306 I.A. 295

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BE IT REMEMBERED, that afterwards, to-wit: On the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

GEN. NO. 9567 MONTANA NO. 19.

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A [illegible]

A[illegible] [illegible] [illegible]

[illegible]

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CLYDE O. ARGYLE, et al.,

vs.

THE TRUCKERS COAL COMPANY,
a corporation et al.,
(Clyde O. Argyle.) et al., Appellants.

Appeal from the
Circuit Court of
Grundy County.

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WOLFE,-- C. J.

Clyde O. Argyle, et al., brought their suit against the Truckers Coal Company, a corporation, and others, to enforce a mechanic's lien against two eighty acre tracts of land. The owners of the land had leased the same to certain individuals for the mining of coal. The appellants are lien claimants who have furnished supplies and performed certain labor and services with regard to the sinking of a shaft for coal on the premises at the instance of the lessees. A hearing was had before the Court who found for the lien claimants, the appellants, and decreed that they were entitled to a lien against the leasehold interest of the Truckers Coal Company, but not as to the fee in the land as held by the owners of the two eighty acre tracts. It is from this judgment that the lien claimants have prosecuted this appeal.

The claim of the appellants that they had furnished labor and material for the mines was denied by the answers of the property owners. This created a question of fact to be decided by the trial court. There is no evidence preserved in the record in this court, and under such circumstances this Court will presume that the evidence

heard by the trial court was sufficient to sustain his findings and judgment. When there is no evidence preserved by the record, this Court cannot review the same. There is nothing in the record in this Court except what is commonly called the Common Law Record. The proceedings at the trial court are not preserved in the record. The appellants seek to sustain their right by virtue of a lease made by the property owners to the Prosser Coal Company. This lease was introduced in evidence at the time of the trial, but is not preserved in this record, and is not now before this Court on review.

The appellees made a motion to dismiss the appeal because a proper record was not before this Court, but we deemed it best to write a short opinion in the case and as the Common Law Record is properly before us, the motion to strike should be overruled. There is no error pointed out in the Common Law Record, therefore there is nothing before this Court for our determination, and the judgment of the trial court will be affirmed.

Affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

*Clerk of the Appellate Court*

(73947) 7

9540

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 7th day of May, in the year of our Lord one thousand nine hundred and forty, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice
Hon. BLAINE HUFFMAN, Justice
Hon. FRANKLIN R. DOVE, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WEITER, Sheriff

306 I.A. 295 2

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BE IT REMEMBERED, that afterwards, to-wit: On [illegible] the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

Gen. No. 9570 Agenda No. 22.

STATE OF ILLINOIS

APPELLATE COURT

SECOND DISTRICT

MAY TERM, A.D. 1940.

| | | |
|---|---|---|
| ADAM W. MILLER, Plaintiff and Appellee, | ) | Appeal from the Circuit Court of Livingston County. |
| vs. | ) | |
| ELMER H. ODELL, Defendant and Appellant. | ) | |

WOLFE,--P. J.

The plaintiff, Adam W. Miller, started a suit in the Circuit Court of Livingston County, Illinois, to recover damages for personal injuries to himself and damages to his automobile arising out of a collision between the plaintiff's automobile and that of Elmer H. Odell, the defendant. The collision occurred in the City of Fairbury, Illinois, on March 5, 1938. The complaint and amended complaint upon which the case was tried, alleged that the collision was caused by the negligence on the part of the defendant, which was the proximate cause of the plaintiff's injuries, and that the plaintiff was in the exercise of due care and caution for his own safety. The defendant filed his answer and denied all allegations of negligence on his part, and that the plaintiff was in the exercise of due care and caution for his own safety at the time of the collision. The case was tried before a jury who found the issues in favor of the plaintiff and assessed his damages at $7950.00 for personal injuries

to himself and $50.00 for the damages to his automobile. The plaintiff filed a remittitur for the sum of $29.13 as damage to his automobile. Judgment was then entered in plaintiff's favor for $7950.00 as damages for the personal injuries which the plaintiff had sustained, and $20.87 for damages to his automobile. It is from this judgment that the defendant appeals.

The plaintiff, Miller, on the morning of March 5, 1938, was driving South on South Fourth Street in the City of Fairbury, Illinois. The defendant, Odell, was backing his car into the street from his garage which was located on the East side of South Fourth Street, and while so doing, he backed it into the car driven by Miller. Mr. Miller's car was slightly damaged, and he sustained injuries for which he is claiming damages in this suit. At the time of the collision neither car was being driven at an unreasonable rate of speed. The defendant Odell did not see the plaintiff's car until after the collision. There was no shrubbery or obstruction of any kind to prevent him from seeing the plaintiff's car if he had been looking.

The plaintiff testified that he saw the defendant's car before the collision, but did not know that the defendant was backing his car into the street. After he glanced at the defendant's car, he then looked ahead and drove his car on. He did not see the defendant's car again until at the time of the collision. Neither the defendant nor the plaintiff sounded a horn or gave any warning of his approach.

At the close of the plaintiff's case the defendant asked for a per-emptory instruction that the jury find the defendant not guilty. The Court refused to give this instruction and the appellant

now insists that the Court erred in so doing. We find no merit in this contention, for the plaintiff, at the close of his evidence, had established a prima facie case in which he was free from negligence, and the defendant guilty of negligence, which was the proximate cause of the injury.

It is next insisted that the Court erred in giving the plaintiff's sixth instruction on contributory negligence. That part which is criticized is as follows: "You are further instructed that this rule of law does not mean or intend to infer that the plaintiff must show that he could not under any circumstances have avoided the collision and damage, but that he must show only that he used ordinary, reasonable and proper care in driving and managing his said automobile." The quotation does not include the whole of the instruction, which is preceded by a proper statement of the law that the plaintiff is required to show that he exercised due care and caution and that he drove his car upon the public street in a reasonable, careful, and prudent manner, or in such a manner as an ordinary careful and prudent person would drive, manage and run an automobile under like or similar circumstances. The jury was instructed that the given instructions are to constitute one connected body and series and should be so regarded and treated by the jury. The Court gave to the jury defendant's instructions 4, 5, 6, 7, 8, 9, 10, 11 and 13, all relating to the law relative to the plaintiff's duty to exercise ordinary care for his own safety. Taking these instructions as a whole they correctly state the law.

Criticism is made of plaintiff's instruction No. 10, in that it does not correctly state the law relative to the jury's assessing

damages in that it refers the jury to the plaintiff's complaint to ascertain what damages are claimed by the plaintiff. It will be observed that this is not a per-emptory instruction, but is one solely for the purpose of instructing the jury of the elements that they may consider in assessing the damages of the plaintiff. This instruction is not subject to the criticism as claimed by the plaintiff. (Bernier vs. Illinois Central Railroad Company 296, Ill. 464.) The appellant also criticizes the same instruction as to the method by which the jury should determine the amount of damages. The case decided by this Court of Harley vs. Aurora, Elgin and Chicago Railroad Company 149 Ill. App. 339, is cited and quoted extensively in the appellant's argument as sustaining their criticism. The quotation is correct, but it leaves out an important element which was before the Court at the time the opinion was written. In the opinion we find the following: "The proof showed that the appellee had spent some time in the hospital and had much medical attendance, nursing and medicines in her own home. It was not proved however, what sum she paid or contracted to pay therefor, or what such services and medicines were reasonably worth, nor was there any proof that her husband had paid them and thereby relieved her from liability therefor." It was because of the lack of proof of the cost of the medical services and the hospital bills that the Court held that this instruction was not applicable. In the present case there is positive proof of the reasonable amount for the doctor's bill, hospital service and X-rays. The plaintiff was testifying in regard to the cost of the hired help which he employed after his injuries, and on objection of the attorney for the defendant, and on motion to strike, his testimony was stricken from the record. The jury were instructed that they have a right to take into consideration all the facts and circumstances

pertaining to such damages as proved by the evidence in the case, and there is no claim in the evidence as to any expenditures made for procuring assistance in carrying on the duties of a farmer, or in loss of profits suffered. The jury could not be mislead in assessing damages, as there was no proof whatsoever offered relative to these matters. Taking the instructions as a series, as the Court instructed the jury to do, we think the jury was fairly and impartially instructed.

The appellant in its argument says: " We admit that the defendant, Odell, was guilty of negligence in his failure to see the plaintiff just prior to the accident. However, we deny that this negligence was the proximate cause of the accident." It is seriously contended by the appellant that the accident in question was caused by the combined negligence of the defendant and plaintiff, and the plaintiff being guilty of contributory negligence, he cannot recover in this action. No doubt, it is the law that a person guilty of contributory negligence cannot maintain an action for damages no matter how negligent the other party might be. Usually the Court has to decide from the evidence: First, whether the defendant was guilty of negligence, then, if so, whether the negligence of the plaintiff contributed to the accident. In this case it is admitted that the defendant by backing out of his drive onto the street without looking, or giving any warning and backing his car into that of the plaintiff, was negligent. The jury, by their verdict, have found that the plaintiff was not negligent, but was in the exercise of ordinary care and caution for his own safety as he was driving down the street. The evidence clearly shows that the plaintiff was driving on the right side of the street in his proper lane of traffic.

There is some dispute as to just where the accident occurred. We think the evidence strongly preponderates in favor of the plaintiff, in that it occurred on the West side of the center of the street. The plaintiff was driving his car at a reasonable rate of speed, looking forward where the ordinary cautious driver is supposed to look, and without any warning, the defendant backed his car into the plaintiff's car, and injured the plaintiff. It is our conclusion that the injuries to the plaintiff were caused by the negligence of the defendant, and that the plaintiff was in the exercise of due care and caution for his own safety at the time of the collision.

It is insisted that the damages to the plaintiff are excessive and therefore this Court should reverse the findings of the jury and the judgment of the trial court. Quite a little medical testimony was introduced to show the injuries that the plaintiff had sustained. The jury heard these witnesses and viewed the exhibits that were presented by the parties to this litigation. They have seen fit to give more credence to the plaintiff's witnesses than to those of the defendant. Doctor William L. Marshall, the attending physician of the plaintiff, testified fully to the condition in which he found the plaintiff shortly after his injuries, and that he has treated him since until the time of the trial. He gave his opinion that he considers these injuries permanent. Evidently the jury believed this testimony. This evidence, corroborated by plaintiff's other witnesses, is sufficient to justify a verdict of $7950.00.

Complaint is made in regard to the closing argument of the attorney for the appellee, in which he stated, "If you were in that condition just consider what you would take--" Before the attorney

had finished the sentence, an objection was made to the argument. The Court sustained the objection and instructed the jury to disregard it. While the argument was improper, we do not consider it to be reversible error.

We find no reversible error in the case and the judgment of the trial court is hereby affirmed.

Affirmed.

had finished the sentence, an objection was made to [illegible].

The Court sustained the objection. [illegible] regard to. While the [illegible] to be tranquille [illegible].

We find no [illegible] the trial [illegible].

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

*Clerk of the Appellate Court*

9415

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 7th day of May, in the year of our Lord one thousand nine hundred and forty, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice
Hon. BLAINE HUFFMAN, Justice
Hon. FRANKLIN R. DOVE, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WEITER, Sheriff

306 I.A. 296

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BE IT REMEMBERED, that afterwards, to-wit: On [illegible] the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

GEN. NO. 9415 AGENDA NO. 23

IN THE APPELLATE COURT OF ILLINOIS,

SECOND DISTRICT

MAY TERM, A. D. 1940.

| | |
|---|---|
| M. W. FRANCKE, et al., Appellants, vs. WILLIAM W. EADIE, as Executor, etc., et al., Appellees. | APPEAL FROM CIRCUIT COURT JO DAVIESS COUNTY. |

HUFFMAN - J.

This is a suit in chancery, commenced by appellants in December, 1925. It was first before this court at the October term, 1935. The case has never yet passed from the embryonic state of pleadings. The first appeal to this court was prosecuted by the present appellants from an order of the circuit court striking the cause from the docket, under rule 7 of that court. At the time of such order, demurrers were pending to the bill of complaint, which had been argued and taken under advisement by the Chancellor, but no disposition thereof had ever been made. The court in that appeal, considered that delay due to the necessity for judicial deliberation, could not be charged against a litigant as laches and should not be permitted to work an injustice. The case was reversed and remanded with directions to grant the motion of appellants to redocket the cause. The opinion in the first appeal was not published, but was subsequently incorporated as a part of the opinion upon the second appeal, in order that the facts might be made to appear. The second appeal is reported as Francke v. Eadie, 301 Ill. App. 254.

The cause was stricken from the docket by the trial court under rule 7, on November 7, 1934. Thus, the matter stood until November 9, 1936, when these appellants filed their motion in the circuit court to vacate the order entered two years previous, striking the cause from the docket. In the meantime, during the intervening two years from the time the cause was stricken from the docket by the trial court, and appellants filed their motion to vacate such order, Benjamin Eadie had died. Following his death, the appellee William W. Eadie, became executor of the estate of the said deceased defendant. After the trial court had denied appellants' motion to vacate the order striking the cause from the docket, the first appeal resulted. Pursuant to the mandate of this court directing that the cause should be redocketed, the appellee executor against whom summons had been caused to issue, filed a plea in abatement, whereby he set up the death of the defendant to the original bill, with suggestion that by the death of such defendant, the cause could proceed only against the surviving defendant, and should abate as to Benjamin Eadie, deceased. Appellants filed their motion to strike the plea in abatement, which motion was overruled and the plea sustained. Whereupon, appellants prosecuted the second appeal to this court from the order of the circuit court sustaining the plea in abatement.

In the second appeal, the parties conceded that the only question was whether the proceedings in the circuit court were to be governed by the Practice Act of 1907, or by the present Civil Practice Act. However, the disposition of the second appeal was not made by this court upon that question. The court found that appellant had no report of proceedings to transmit to the court of review, and had nothing except a transcript involving the redocketing of the cause, together with the plea in abatement and motion thereto. But in the record brought to this court, there was nothing to show that notice

The cause was advanced in order to obtain a [illegible] under rule 7, on October [illegible] 1922. The [illegible] 9, 1923, when [illegible] court to vacate the [illegible] cause from the [illegible] years from the [illegible] trial court, [illegible] Benjamin [illegible] M. Hall, [illegible] After the trial court had [illegible] order abolishing the [illegible] Pursuant to [illegible] be reopened, and [illegible] caused to [illegible] trial of the [illegible] the legal [illegible] conveying [illegible] a portion [illegible] said [illegible] proceeding [illegible] circuit court [illegible]

In the [illegible] this was [illegible] covered [illegible] ant. [illegible] this court [illegible] no reason [illegible] nothing [illegible] together [illegible] record [illegible]

of appeal was ever filed in the trial court. This sixty day period for transmitting the record to this court, had long since expired. The appellee had put appellants in default by motion to dismiss the appeal. Thereafter, appellants filed their motion for leave to file additional transcript of record, which contained a copy of the notice of appeal. This motion was granted. The appellee insisted that he was as much entitled to the benefit of the sixty day rule after its expiration, as the appellants were entitled to its application within such period. This court considered that perhaps it should not thus abbrogate the rules of practice and procedure on appeal in the manner which it had done, in permitting appellants to file additional record after the time therefor had elapsed, and met appellee's motion by ordering the cause stricken, on the theory that no appeal was pending in this court. Thereafter the case reached the Supreme Court by leave to appeal. The order of this court striking the cause, was reversed and the case remanded to this court with directions to consider and pass upon the questions presented upon the second appeal. The matters now under consideration are those raised in the second appeal that was prosecuted to this court and which are reviewed in Francke v. Madie, 301 Ill. App. 254.

As above stated, it is conceded by the parties to the present appeal, that unless the Civil Practice Act applies to the proceedings below, the plea in abatement was properly sustained.

It will be observed that this suit was started by a bill in chancery in December, 1925; that general and special demurrers were filed to the bill of complaint, which demurrers were argued before the court and taken under advisement; that no disposition of the demurrers has ever been made, and the same still stand to the bill of complaint as originally filed. Appellants urge that the Civil Practice

Act of 1933, controls, and that by virtue of Sec. 178, ch. 110, 1939 Ill. St., on Abatement, the plea in abatement was erroneously sustained, and that they are entitled to have appellee executor joined as a party defendant to the action in the circuit court, with the surviving defendant. Appellees urge that under rule 1, of the Supreme Court, the above section of the Civil Practice Act on abatement, does not apply, and that by force and effect of said rule 1, of the rules of practice and procedure as promulgated by the Supreme Court, the Civil Practice Act does not govern the proceedings of the lower court in this case; that there has been no stipulation of the parties that the Civil Practice Act shall govern; and that there has been no order of the Court to such effect.

We find that the process in this case issued, and pleadings therein were filed, seven or eight years before the Civil Practice Act went into effect. Rule 1, of the Supreme Court, and Sec. 259.1 of ch. 110, Ill. St. 1939, (Civil Practice Act), with respect to what pending actions the Civil Practice Act should govern, provides among other things that, "all suits in which a summons has been issued prior to January 1, 1934, but in which no pleadings have been filed by either party thereto,***." And in conclusion it is provided, "Except as provided by this rule, or by written stipulation of parties, or by order of the court, upon notice and motion, proceedings instituted prior to January 1, 1934, will not be governed by the Civil Practice Act." With reference to the first provision above referred to, we find that the summons was issued and the pleadings filed in this case, many years prior to January 1, 1934. The state of the pleadings remain the same now as they originally existed, except for the plea in abatement filed by appellee executor. Under such circumstances, we are of

the opinion that the settlement of the pleadings is governed by the course of practice in force prior to the taking effect of the Civil Practice Act on January 1, 1934. Therefore, the plea in abatement as filed by appellee, was proper, and the court properly sustained the same. The judgment of the trial court is therefore affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

*Clerk of the Appellate Court*

9543

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 7th day of May, in the year of our Lord one thousand nine hundred and forty, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice
Hon. BLAINE HUFFMAN, Justice
Hon. FRANKLIN R. DOVE, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff

306 I.A. 297

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BE IT REMEMBERED, that afterwards, to-wit: On [illegible] the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

GEN. NO. 9543 AGENDA NO. 6

IN THE APPELLATE COURT OF ILLINOIS,

SECOND DISTRICT

MAY TERM, A. D. 1940.

| | |
|---|---|
| HARRY BUTLER, as Assignee of S. A. CALHOUN, Appellants, | |
| vs. | APPEAL FROM CIRCUIT COURT LEE COUNTY |
| GREAT LAKES PIPE LINE COMPANY, a Corporation, Appellee. | |

HUFFMAN - J.

In the spring of 1931, appellee was engaged in laying a pipe line through Lee county, near a farm owned by Mr. S. A. Calhoun. The pipe line crossed a lateral of the Inlet Swamp Drainage District of said county, near the land in question. During the process of the construction of the pipe line across this lateral, it appears that certain obstructions were made which hindered the flow of water through the lateral into the main ditch. During this time, heavy rains came on and the corn crop then growing on 120 acres of the farm of Mr. Calhoun, is alleged to have been flooded and greatly damaged because of overflow water resulting from the construction work of appellee in connection with the laying of its pipe line across the lateral. Mr. Calhoun, through his agent and attorney in fact, H. S. Nichols, requested appellee to make settlement of damages for the alleged flooding of the 120 acres of growing corn. Pursuant to such request, the landowner through his agent Nichols, made settlement with appellee of the prospective damages to the corn crop, on June 27, 1931, evidenced by a written memoranda. By the terms of the settlement agree-

GEN. NO. 9543 AC NO. 10. 3

IN THE APPELLATE COURT OF ILLINOIS,

SECOND DISTRICT

MAY TERM, A. D. 1940.

| | |
|---|---|
| MARTY BUTLER, as assignee of S. A. OLMSTEAD, appellee, | |
| vs. | ABSTRACT OF RECORD |
| GREAT NORTHERN PIPE LINE COMPANY, a corporation, Appellee. | |

HUTCHAN - 1.

In the spring of 1938, appellee was engaged in laying a pipe line through [illegible] . . . [illegible] Olmstead. The pipe line crossed a [illegible] of the Illinois [illegible] of said county, near the [illegible] . Shortly [illegible] the completion of the pipe line across his farm [illegible] certain obstructions were made which [illegible] the lateral into the main ditch. During [illegible] on and the corn crop [illegible] Olmstead, is alleged [illegible] of overflow [illegible] connection with the [illegible] Oilmstead, through his [illegible] quested appellee to [illegible] line of the 140 acres [illegible] landowner through his [illegible] of the propulative [illegible] danced by a written [illegible] . By [illegible]

ment, appellee paid to the landowner $1200 in cash, subject to certain contingencies to be later determined, which might or might not increase the damages. These contingencies consisted of the provisions that in the event the 120 acres did not yield on the average 40 bushels of corn per acre, and that if the surrounding corn lands in that locality within a radius of two miles, should yield an average of at least 60 bushels per acre, then additional damages should be paid to the landowner; but it was provided that if the corn land within a radius of two miles of the 120 acres did not yield on an average of at least 60 bushels of corn per acre, then there should be no obligation whatever upon the part of appellee to pay any additional damages.

Appellant was the tenant on the lands of Mr. Calhoun. In 1938, he became assignee of the landowner's interest in the settlement agreement made with appellee. He brought his suit at law in January, 1939, to recover additional damages from appellee, alleging that the 120 acres did not yield on an average of 40 bushels to the acre, and alleging that the corn lands within a radius of two miles from the 120 acre tract, did yield on an average of at least 60 bushels of corn per acre for the 1931 crop. Judgment for additional damages in the sum of $5000, was asked for injury to the corn crop on the 120 acres for the 1931 season, in addition to the $1200 previously paid.

When the cause came on before the court, it was discovered by appellant that an erroneous description of the 120 acres had been inserted in the memoranda agreement. The plaintiff below took leave to amend the complaint, wherein among other things he set up the error in the description and asked that reformation thereof be made. Following such amendments, the court transferred the cause to the Chancery docket, where the case was heard. The court granted reformation as to the description of the 120 acres, but found all other issues in favor

[illegible] month, apples paid to the landowner 1200 in cash, subject to certain adjustments to be later determined, which [illegible] might not increase the damage. These findings of [illegible] are non-[illegible] violations that in the event the 120 acres did not yield an average 40 bushels of corn per acre, and that if the average [illegible] in that locality within a radius of two miles, equally [illegible] an average of at least 60 bushels per acre, then a [illegible] average should be paid to the landowner; but if you provided [illegible] within a radius of two miles of the [illegible] average of at least 60 bushels of [illegible] be no obligation whatever upon the part [illegible] additional damages.

Appellant was the owner [illegible] Illinois. In 1934, he became analyzing of the landowner's interest [illegible] agreement made with appellee. [illegible] 1939, to recover additional damages [illegible] 120 acres did not yield an average of 40 [illegible] and alleging that the corn [illegible] 120 acres [illegible] corn [illegible] to the 1939 crop. [illegible] the [illegible] 40 [illegible] acres for the 1939 [illegible]

[illegible] appellant [illegible] insofar as [illegible] average [illegible] to [illegible] in the [illegible] ing such [illegible] decree, where the case was [illegible] the description of the [illegible]

of the defendant appellee and against the plaintiff appellant, and rendered judgment accordingly. It is from such judgment appellant brings this appeal.

Appellant produced some seven or eight witnesses who testified that they raised corn within a radius of two miles of the tract in question and during the season in question. Some of them testified that to the best of their recollection, their yield was at least 60 bushels per acre, while others testified that in their opinion, their land yielded more than 60 bushels per acre. This testimony was given some eight years following the season in question and it does not appear these witnesses were testifying from records made at the time. Other witnesses testified for appellee regarding the average yield of corn per acre on the lands they farmed within the area involved. Their testimony is to the effect that according to the best of their recollection, the yield was approximately 50 bushels per acre. We find nothing in the record to indicate how many acres of corn were planted and harvested within two miles of this tract during the crop season of 1931. Such is a matter wholly in the realm of conjecture and speculation. The evidence on the part of appellant is too inadequate, indefinite and uncertain to support a judgment in his favor under the terms of the memoranda agreement. The judgment of the trial court is therefore affirmed.

Judgment affirmed.

of the defendant appellee and against the plaintiff appellant, and rendered judgment accordingly. It is from such judgment appellant brings this appeal.

Appellant produced some seven or eight witnesses who testified that they raised corn within a radius of two miles of the town in question and during the season in question. None of them testified that to the best of their recollection, their yield was at least 60 bushels per acre, while others testified that in their opinion, their land yielded more than 60 bushels per acre. [illegible] seven some eight young fellows [illegible] in question and it does not appear these witnesses were [illegible] made on the farm. Other witnesses testified for [illegible] the average yield of corn per acre on the lands [illegible] involved. Their testimony is to the effect that according to the best of their recollection, the yield was approximately [illegible] per acre. [illegible] find nothing in the record to indicate [illegible] of corn were planted and harvested within two miles [illegible] season of 1931. Such is a matter [illegible] and specification. The evidence in the [illegible] is in the [illegible] inadequate, indefinite and [illegible] to support a judgment in favor under the terms of the [illegible] judgment of the trial court is therefore affirmed.

Affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
*Clerk of the Appellate Court*

(73917) 7

9556

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 7th day of May, in the year of our Lord one thousand nine hundred and forty, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice
Hon. BLAINE HUFFMAN, Justice
Hon. FRANKLIN R. DOVE, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff

306 I.A. 297

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BE IT REMEMBERED, that afterwards, to-wit: On the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

GEN. NO. 9556 AGENDA NO. 12

IN THE APPELLATE COURT OF ILLINOIS,

SECOND DISTRICT

MAY TERM, A.D. 1940.

| | | |
|---|---|---|
| RUTH B. WHITE, Appellee, vs. CITY OF ROCKFORD, a Municipal Corporation, Appellant. | ) | APPEAL FROM CIRCUIT COURT WINNEBAGO COUNTY. |

HUFFMAN - J.

This was an action by appellee to recover damages for injury sustained by reason of falling on the sidewalk on west State Street in the city of Rockford. The first trial resulted in a verdict for appellee in the sum of $204. Upon her motion, a new trial was granted. The second trial resulted in a verdict for appellee in the sum of $1330, and appellant brings this appeal from judgment rendered on the verdict.

The accident occurred on December 19, 1938, at about five o'clock in the afternoon. The place of the accident was in the down town business section of the city. Appellee was then sixty-six years of age. She had been visiting the stores and window shopping with her two grandchildren. At the time of the accident, the street lights were on, as well as the lights in the stores and store windows. Appellee and her grandchildren were on the way to their parked car for the purpose of returning home. The down town section on the afternoon in question,was crowded with people and traffic. The hole

in the sidewalk was approximately 2½ feet long and 18 inches wide at the widest place. The break in the walk extended down to the grout, which consisted of a mixture of cement with gravel, such as is commonly used for the base of walks of this character. Appellee sustained a painful hip injury in the fall and was confined to her bed for approximately two months.

This break in the sidewalk had existed for about a year prior to appellee's fall. Appellee had not been accustomed to using this walk and had no knowledge of the defect therein. When she stepped into the hole or broken portion in the walk, her ankle was turned in such a manner as to cause her to lose her balance. She attempted to right herself but was unable to do so, and fell with a turning movement of her body, which threw her to the pavement on her left hip and shoulder. The hip joint appears to have been injured, but fortunately was not broken. She was surrounded by other pedestrians at the time of her fall. Following the fall, she became sick and faint and was removed to her home. Here she says she was confined to her bed and received medical and nursing care for eight weeks. She claims to still suffer from the effects of the hip injury.

Appellant assigns five grounds for reversal, namely, that the court erred in refusing to instruct the jury for appellant at the close of plaintiff's case; that the court likewise erred in refusing to so instruct the jury at the close of all the evidence; that the court erred in refusing instructions tendered by appellant; that the court erred in refusing to enter judgment for appellant notwithstanding the verdict; and that the court erred in refusing appellant's motion for a new trial.

The duty of a city to use reasonable care to keep its sidewalks in a reasonably safe condition for the use of the public is so well

in the sidewalk was approximately 3½ feet long and 12 inches wide at the widest place. The crack in the walk extended down to the front, which consisted of a multitude of [illegible] [illegible], when he is correctly said for the area [illegible] [illegible]. A police analyzed a picture [illegible] [illegible] had for approximately two [illegible].

This break in the [illegible] to applicant's fall. [illegible] walk and was [illegible] [illegible] into the [illegible] upon [illegible] right [illegible] [illegible] ment of her body. [illegible] [illegible] and shoulder. [illegible] was not broken. [illegible] of her fall. [illegible] removal [illegible] removal [illegible] still [illegible].

Applicant [illegible] court [illegible] place of [illegible] to [illegible] court [illegible] court [illegible] the verdict; [illegible] for a new trial.

The [illegible] in a reasonable [illegible]

established, authority in support thereof is unnecessary. Nothing appears in the evidence to in any way have warned or apprised appellee of the existence of the defect in the walk. The first she knew of its existence was after she had fallen. It was shortly before Christmas and the streets in the down town section where appellee and her grandchildren were waling, were crowded with people. "A pedestrian upon a sidewalk may ordinarily assume that it is in a reasonably safe condition for travel. To hold a personabsolutely bound to keep his eyes fixed upon a sidewalk in search of defects and dangerous places, would be to establish a manifestly unreasonable and impracticable rule." Graham v. City of Chicago, 364 Ill. 638, 640. To state the evidence in detail in the above respect, would serve no good purpose. We have examined it and find nothing to indicate otherwise than that the appellee was in the exercise of due care at the time she met with her misfortune.

Appellee was permitted to show prior accidents at the same place. The witness Mrs. Daisy Stewart testified that she fell because of this defect in the walk, about the month of August, 1938. Appellant objected to the introduction of her testimony, to which objection the court replied, "No, that is competent to show notice - not to show other acts of negligence or anything of that kind, but to show notice to or knowledge of the city." A subsequent witness for appellee, Mr. Stiffler, testified that he fell because of this defect in the walk, during the fall of 1938. No objection appears to have been made to his testimony. Such evidence of prior accidents is admissible to show knowledge of the defect on the part of the city. Wells v. Village of Kenilworth, 228 Ill. App. 332, 337; Budek v. City of Chicago, 279 Ill. App. 410, 422. In this connection it was said in the case of District of Columbia v. Armes, 107 U. S. 519; 27 L. ed.

618, that proof of like accidents which occurred at the same place in a defective sidewalk and due to the same defect, was admissible, as it tended to bring to the attention of the city authorities the dangerous character of such defective condition of the walk. Where the duty to keep sidewalks in safe condition rests upon the city, it is liable for injuries caused by its neglect or omission in such regard. However, a corporate body can neither take care nor neglect to take care, except through its officers or servants. It has been said that actual notice is not the only test of liability of a city for a defective sidewalk; that it is chargeable with constructive notice if the sidewalk has been out of repair so long that the city through its proper officers, in the exercise of reasonable diligence, could have discovered the defects. City of Joliet v. Johnson, 177 Ill. 178; City of Sterling v. Merrill, 124 Ill. 522; Sherman v. City of Chicago, 101 Ill. App. 312; City of Streator v. O'Brian, 103 Ill. App. 85.

Appellant complains of the court's refusal to give its instruction No. 3, which was as follows: "The court instructs the jury that any evidence as to any other person having fallen at this hole, is admissible only for the purpose of endeavoring to impute notice to the city of this defect. You are instructed to entirely disregard such evidence in your consideration of all the other questions involved in this case." A record need not be free from all error, but it is essential that it shall be free from prejudicial error. When the first witness was being examined as to her falling because of this defect in the sidewalk, appellant interposed its objection to such testimony and the court in overruling same, stated, that the evidence was competent to show notice or knowledge of such defect in the walk

to the city, but not to show other acts of negligence. We are not of the opinion that the refusal to give such instruction constitutes reversible error. The jury well understood from the court's statement, the purpose for which such evidence was admitted. No objection appears to have been renewed thereto with respect to the testimony of the second of such witnesses. There is nothing about their testimony in this regard to increase the damages on behalf of appellee. It does not appear that any recovery was being sought by reason thereof. Therefore, such testimony was not of such a character as to be considered evidence of acts of separate negligence, but only served as circumstances to show the dangerous character of the defect, and the opportunity of appellant to take notice of same. Furthermore, the evidence shows that this condition in the walk had existed for about a year and was located on a busy street in the down town section of the city. Under such circumstances, the jury might reasonably conclude that the city through its officers or servants, in the exercise of reasonable diligence, could have discovered such defect.

The judgment of the trial court is therefore affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
*Clerk of the Appellate Court*

Opinion filed

(5)

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PUBLISHED IN ABSTRACT

**Charles L. Matthews, Administrator C.T.A. of the Estate of George W. Solomon, Deceased, Plaintiff-Appellant, v. The Franklin Life Insurance Company of Springfield, Illinois, an Illinois Corporation, Defendant-Appellee.**

306 I.A. 325

**Gen. No. 9226**

MR. PRESIDING JUSTICE FULTON delivered the opinion of the court.

The appellant, in behalf of the beneficiary named therein, sued upon two policies of insurance on the life of Edward C. Solomon, one for $15,000.00, and the other for $10,000.00. The case was originally reviewed by this court and the facts fully set forth in the opinion reported in abstract form in 296 Ill. App. 651. In that opinion it was the ruling of this conrt that the question of compound interest was not in issue under the pleadings as they then stood in the record in this case, and the only contention of appellant was that an error was made in the date from which interest should be computed, whereby a double charge of interest was erroneously made and computed for a period of one month. On the latter question this court held adversely to the claim of appellant, but reversed and remanded the cause to the circuit court of Sangamon county for retrial.

An amended complaint was then filed by appellant containing five counts to which appellee answered setting up affirmative defenses, and reply was properly filed by appellant.

In our judgment, the only new matter contained in the amended complaint which is important on this appeal is the claim that compound interest was charged to the insured on policy loans made June 24, 1935. All other questions raised in the amended and new pleadings were disposed of by the prior opinion. The trial court found against the appellant on the question of compound interest and entered judgment against him for costs.

Much additional testimony was introduced on the retrial of this cause, which in our opinion clarifies the

record on the question of interest and definitely shows the history of both policy loans and just how all charges and payments were applied.

It is the contention of appellant that the appellee charged interest on interest on the policy loans, which were increased and renewed on June 24, 1935, amounting to a total of $21.15, which under the terms of the policies was sufficient to carry said insurance in effect to or about October 30, 1936. The date of death of the assured was October 15, 1936.

It is the position of the appellee that the policies lapsed on September 30, 1936. The premium paying period on both policies was on May 25th of each year and privilege granted to the assured of making premium payments quarterly or semi-annually, and the last quarterly payment was made on May 25, 1936, which included the period to August 25th of that year. No premium was paid by the assured on August 25, 1936, nor within the thirty days grace period provided by the policy. Accordingly the policies by their terms lapsed for the non-payment of premiums. Thereupon because of other provisions of the policy, the appellee applied the net reserve to each of the existing loans leaving for the purchase of single premiums extended insurance, the sum of $20.68 on the larger policy and $13.85 on the smaller one. The only real contention between the parties is as to how compound interest relates to the last loans made and renewed on the policies on June 24, 1935, which matured on May 25, 1936. The loan agreements provided that after maturity, May 25, 1936, the loans should bear interest at the rate of six per cent payable in advance. On June 24, 1935, a third loan was made on each policy. On the larger policy, the new loan was for the sum of $3,495.00. The principal amount of the loan included the following items: Payment of former loan, $3,129.62; payment of one year's interest in advance on loan to May 25, 1936, $209.70; paid part of annual premium due May 25, 1935, $155.68.

We can see no payment of compound interest in any of those items. The payment of the old loan was for the stated amount due. The second item of $209.70, was for simple interest on the new loan of $3,495.00, for one year, and while there might be some question about the charge of interest on the increased amount of the loan from May 25, 1935, to June 24, 1935, the amount of the same would be so small it would make no difference in the decision of this case. The last

item was for a portion of the annual premium payment. The same character of items and the same situation applies as to the loan on the smaller policy.

The law of Illinois permits the deduction of interest in advance and paying it from the proceeds of the loan. *Mitchell* v. *Lyman,* et al, 77 Ill. 525.

While courts will construe ambiguous provisions of an insurance policy favorably to the insured, clear provisions upon which the company's calculations are based should be maintained unimpaired by loose interpretations. *Coons* v. *Home Life Ins. Co. of N. Y.,* 368 Ill. 231. 13 N. E. Rep. 2nd, 482.

Without reiterating the rather full discussion of this case in our former opinion, we feel that the additional proofs introduced on the retrial have amply clarified the question about the interest; that the method adopted by the appellee in closing out these policies was regular and proper, and that the judgment of the circuit court should be and is affirmed.

*Affirmed.*

14 (A-25083)

41080

A. B. C. ELECTROTYPE COMPANY, a corporation, et al.,

Plaintiffs-Appellants,

v.

SCHROEDER BROTHERS COMPANY, a corporation,

Defendant-Appellee.

) APPEAL FROM THE MUNICIPAL COURT OF CHICAGO.

306 I.A. 475

MR. PRESIDING JUSTICE WILLIAM J. SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiffs bring this appeal from a judgment entered in the Municipal Court for $186.68 in their favor and against the defendant corporation, as plaintiffs claim the amount of the judgment is not sufficient. The cause was tried before a judge and jury.

It appears that the plaintiffs are comprised of corporations, individuals and co-partners who are members of an association known as the Employing Electrotypers Association; that said plaintiffs brought suit against Schroeder Brothers Company, a corporation, and a former member of the association, for the purpose of collecting dues and assessments alleged by plaintiffs to be due from said defendant.

No point is raised as to the pleadings.

Plaintiffs' theory of the case is that the defendant was a member of this association and as a member was bound by the association's Constitution and by-laws; that under the Constitution and by-laws, the defendant could resign from the association at any time it saw fit, but that in order for the resignation to take effect, the tendered resignation must comply with the rules and regulations of the association; that the tendered resignation of the defendant was not in conformity with these rules and regulations and that the defendan was so informed by the secretary of the association; that subsequently the defendant withdrew its attempted resignation and continued to participate as a member in the affairs of the association, until the

| | |
|---|---|
| A. B. O. ELECTROPLATE COMPANY, a corporation, et al., plaintiffs-appellants, v. CONSOLIDATED ELECTROPLATE, a corporation, defendant-respondent. | [illegible] |

306 I.A. 475

[illegible] WHETHER THE OPINION OF THE [illegible].

Plaintiffs bring this appeal from a judgment entered in the municipal court for [illegible] in their favor and against the defendant corporation, on a liability claim the amount of the judgment is not sufficient. The cause was tried before a judge and jury.

It appears in the [illegible] the plaintiffs are proprietors of corporations, individuals and co-partners who are members of an association known as the Employing Electroplaters Association; in [illegible] plaintiffs brought suit against Consolidated Electroplate Company, a corporation, and a former member of the association, for the purpose of collecting dues and assessments alleged by plaintiffs to be due from said defendant.

No point is raised in the [illegible].

Plaintiffs' theory of the case is that the defendant was a member of this association and as a member was bound by the association's constitution, by-laws; in short the association and by-laws, the defendant [illegible] time it was ill, [illegible] the tendered resignation must comply with the [illegible] of the association; that the tendered resignation [illegible] not in conformity with these rules and regulations; the defendant was so informed by [illegible] the defendant corporation [illegible] permitting an a member in the utilize of the [illegible] and the

association expelled it for non-payment of dues and assessments; that at the time of the expulsion, after allowing certain credits, due from the plaintiffs for work performed, there was due and owing to the association $794.77.

Plaintiffs further contend that the interpretation of the Constitution and by-laws rested solely within the province of the court and that if the evidence of the defendant failed to show a compliance with these rules and regulations, it was the duty of the court to direct a verdict at the close of the defendant's case, or to enter a judgment non obstante veredicto.

Defendant's theory of the case is that under the by-laws of plaintiff association, it became the duty of plaintiffs to notify defendant when 15 days in arrears of its delinquency and that upon failure to pay within 10 days after such notice it then became mandatory on the part of plaintiff association to either "expel or suspend for non-payment of dues as the Board of Governors may prescribe" and in either event the accruing of dues would then have terminated.

Defendant further contends that it became delinquent January 1, 1934 and it was shown that defendant requested plaintiffs to expel it until it again became able to pay its exorbitant dues, but that plaintiffs refused to do so; that defendant mailed its resignation on May 10, 1934 when indebted for dues in the sum of $39.72, which resignation plaintiffs refused to accept; that this resignation was received by plaintiffs on or about May 11, 1934 and, against its will to remain a member, plaintiffs kept defendant on its rolls until August 13, 1935, charging dues and special assessments against it until it owed, so plaintiffs state, the sum of $941.73.

Defendant further contends that when defendant's representative attended meetings after May 10, 1934, it was on an invitation to all the trade, whether members or not; that invitations were sent to all concerns in that line of business and that defendant's membership should have terminated by expulsion January 25, 1934 (15 days

delinquency and 10 days' notice), or, in the alternative on May 10, 1934, the date of the resignation.

In the affidavit of additional defence, defendant sets forth that the Chicago Employing Electrotypers Association, plaintiff in the above entitled cause, is a combination of employers and was a combination of employers prior to the date of the filing of this cause, organized for the purpose of combining, confederating and conspiring for the purpose of fixing and maintaining prices of the commodities manufactured and sold by the said plaintiffs and fixing and maintaining wages of employees contrary to the laws of the State of Illinois in such case made and provided, by reason whereof the alleged claim of plaintiffs set forth in the statement of claim herein is unlawful and not binding on defendant, by reason whereof defendant owes plaintiffs nothing.

Without discussing the right of a corporation organized under the laws of this State to join and agree to be bound by by-laws other than its own, regardless of the purpose for which said corporation was organized, the main question arising herein is as to whether the time when the dues became due dated from January 1, 1934, the day defendant requested to be expelled; or on May 10, 1934, the date of the resignation wherein defendant offered to pay the dues up to date; or on August 13, 1935, when defendant was expelled for nonpayment of dues.

Defendant contends that it became the duty of plaintiffs to notify defendant when 15 days in arrears of its delinquency and that upon failure to pay within 10 days after such notice it then became mandatory on the part of plaintiff association to either "expel or suspend for non-payment of dues as the Board of Governors may prescribe" and in either event the accruing of dues would then have terminated.

The Constitution and By-Laws of the plaintiff company with

delinquency and 10 days' a time), or, at the [illegible] 1924, the date of the resignation.

In the affidavit of [illegible] forth that the Union's [illegible] in the above entitled cause, is [illegible] a combination of employers [illegible] cause, organized for the purpose of [illegible] conspiring for the purpose of fixing [illegible] the commodities manufactured [illegible] fixing and maintaining wages of [illegible] the State of Illinois in such [illegible] exercect the alleged rights of [illegible] claims be sin is unlawful [illegible] where of defendant owes [illegible]

Without discussing the [illegible] under the laws of this state to [illegible] laws other than its own, regardless [illegible] corporation can be [illegible] whether the time when the [illegible] the by relations to which [illegible] the of the realign than [illegible] to their or to argue it, [illegible] nonpayment of dues.

[illegible] to notify [illegible] th t upon failure [illegible] [illegible] "[illegible] or member for nonpayment of [illegible]

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any receipts and [illegible] have taken tod.

The constitution [illegible]

reference to expulsion, provide that dues shall be payable monthly in advance and that members in arrears for 15 days shall be notified by the secretary and, failing to pay within 10 days after such notice may either "expel or suspend for non-payment of dues as the Board of Governors may prescribe."

We do not think such a construction of the foregoing section of the Constitution and by-laws would be either illegal or unreasonable. We also think that a member, under the circumstances, would have a right to believe that having tendered a request for expulsion and also a resignation because of its inability to pay dues, said requested expulsion should have been granted, or its resignation accepted when tendered. This appears to us as a reasonable construction thereof.

As was said in Highland Park Association v. Hoseker, 169 Mich. 4, at page 9:

> "In a case like the one we are considering, the validity of by-laws and regulations relating to the management of the property, affairs and business of the association, depends upon the fact of their being reasonable, and their reasonableness depends upon particular circumstances or matters in pais, and is therefore a question for the jury."

Plaintiffs also complain that the court gave an instruction to the jury advising the jury that they might find for the defendant. This instruction could have done no harm as evidenced by the fact that the jury did not find for the defendant but found for plaintiffs. The sum of $186.68 was the exact amount requested by plaintiffs of the defendant for delinquent dues, as set forth in plaintiffs' letter dated May 4, 1934. There was a bill for printing for $146.98, which was admittedly due defendant, but for which defendant was not given credit. Defendant should be the one to complain and not plaintiffs.

The jury saw and heard the witnesses and having considered the evidence before us we cannot say that the verdict of the jury is against the manifest weight of the evidence.

For the reasons herein given the judgment order of the Municipal Court is hereby affirmed at plaintiffs' costs.

JUDGMENT AFFIRMED.

HEBEL AND BURKE, JJ. CONCUR.

reference to expulsion, provide that such notice be given in advance and that a hearing in writing for it have been granted by the secretary of [illegible], failing to say either [illegible] such notice may either "[illegible] or personal [illegible] of [illegible] Board of [illegible]."

We do not think such construction of the [illegible] section of the Constitution and by-laws [illegible] unreasonable. We also think that a member, under the circumstances, could have a right to believe [illegible] expulsion and also a reasonable [illegible] dues, said [illegible] or its [illegible] consideration [illegible].

We [illegible] in [illegible] v. [illegible], 158 [illegible], 6, at page 3:

> "In a case like the [illegible], the validity of by-laws and regulations relating to the [illegible] of the property, affairs and business of the [illegible], [illegible] the [illegible] of their being [illegible], [illegible] depends upon particular circumstances [illegible] and is therefore a question for the jury."

Liability also [illegible] in the [illegible] to the jury [illegible], the jury [illegible] for the defendant. This instruction could have done no [illegible] that the jury did not find for the [illegible] The sum of $50.00 [illegible] the defendant [illegible] dated May 9, 1924. There was a bill for [illegible] $50.00, which was admittedly due defendant, but for which no [illegible] credit. Defendant should be [illegible]

The jury [illegible] evidence before us [illegible] against the weight of the evidence.

For the reasons herein [illegible] Municipal Court is hereby [illegible] costs.

EDGAR, CHIEF JUSTICE, JR., [illegible].

41187

FRANCES ANN KREMER, a minor by ALBERT E. KREMER, her father and next friend,

Plaintiff - Appellee,

v.

THE VIM COMPANY, an Illinois Corporation,

Defendant - Appellant.

APPEAL FROM

MUNICIPAL COURT

OF EVANSTON.

306 I.A. 476

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

The action in the instant case is for personal injuries sustained by the minor plaintiff as the result of defendant's alleged negligence in the maintenance of the entrance way to its store. The case was heard before the court and jury, who rendered a verdict for $750.00 in favor of the plaintiff, upon which the court entered judgment. It is from this judgment that defendant appeals.

The defendant operates several stores, the sole and only business of which is the sale of sporting goods at retail on a cash and carry basis. One of its stores is located in the shopping district of Evanston, Illinois, at 1574 Sherman Avenue, and has been located at that address for a period of about two years. The entrance to this store is 8 feet wide and runs back from the sidewalk line twelve feet between display windows on either side to the store door. The floor of the entrance way is smooth, being surfaced with terrazo, slippery when wet, and slopes upwards from the sidewalk line to the door about a foot and a half. On the morning of January 28, 1938, Albert E. Kremer, the father who instituted this suit as next friend of the plaintiff, drove with plaintiff and his wife to the shopping district of Evanston where he let his wife off. He then parked the car which they were using on Davis Street. After parking the car, he got out and started for the Vim store carrying the plaintiff who was eleven months old and weighed 28 pounds. In addition, he carried in his arm a pair of basket ball shoes which were unwrapped. His purpose in going to the Vim store was to exchange the pair of shoes,

MARCUS AND [illegible], minor by
ALBERT E. [illegible], her father and
next friend,

Plaintiff - Appellee,

v.

THE VIA COMPANY, an Illinois corporation,

Defendant - Appellant.

300 I.A. 76

MR. JUSTICE [illegible]:

The action in the instant case [illegible] sustained by the minor plaintiff [illegible] negligence in the maintenance of the [illegible] case was heard before the court without [illegible] $750.00 in favor of the plaintiff, [illegible] entered judgment. It is from this judgment that defendant [illegible].

The defendant [illegible] business of [illegible] and early years. [illegible] of Evanston, Illinois, at 1824 [illegible] at that address for a period of [illegible] this store is 8 feet wide and from [illegible] feet between [illegible] floor of the entrance way is [illegible] all entry when [illegible] door about 6 feet and [illegible] Albert [illegible] of the plaintiff, [illegible] district of Evanston where he lived with [illegible] our which they were [illegible] be got out and [illegible] was eleven months old [illegible] in his arm a pair of [illegible] purpose in going to the [illegible]

which he had purchased in that store, from plaintiff, a few days before. As the father left the sidewalk and took three or four steps into the entrance way, he slipped and fell; and in doing so, the plaintiff's head hit the floor as a result of which she suffered a bursting fracture of the skull. The medical, X-ray and nursing expenses incurred amounted to $42.00.

There seems to be some contradiction in the testimony of the witnesses for the defendant and for the plaintiff, and also between different witnesses of the plaintiff, concerning the condition of the weather on the morning in question. Plaintiff's witnesses testified that it was neither raining nor snowing at the time of the accident, but that there had been some snow earlier in the morning and that there was snow generally in the streets and sidewalks of Evanston except downtown. Defendants witnesses testified that it was raining and snowing all morning including the time of the accident, and the weather report showed there was snow all morning commencing at 7:43 A. M. which continued until 7:43 A. M. and that the temperature ranged from 31 to 35. Prior to 7:00 A. M. on the 28th, there had been no precipitation for twenty-four hours. It seems that there was also a contradiction between plaintiff's different witnesses as to whether the sidewalk in front of the store was dry or wet. Plaintiff's father wore rubbers and her mother galoshes.

All witnesses, it seems, agreed that at the time of the accident the entrance way was slippery because it was wet. Plaintiff's father testified that this wetness was occasioned by slush from one-quarter to one-half inch deep over the entire floor of the entranceway, while another witness for plaintiff limited the slush area to the outer two feet of the entranceway next to the sidewalk. The entrance-way itself was built over the heated basement of the store, so that any snow falling in the entranceway would melt more rapidly there than on the sidewalk, and any water would run off to the sidewalk due to the slope.

which he had purchased in that store, [illegible] days before. As the father left the sidewalk and took [illegible] the entrance way, he slipped and fell; and in doing so, the plaintiff's head hit the floor as a result of which he suffered - [illegible] fracture of the skull. The medical, [illegible] nursing expenses incurred amounted to $[illegible].

There seems to be some contradiction in the testimony of the witnesses for the defendant and for the plaintiff, and also between different witnesses of the plaintiff, concerning the condition of the weather on the morning in question. Plaintiff's witnesses testified that it was neither raining nor snowing at the time of the accident, but that there had been some snow [illegible] the morning and that there was some [illegible] in the [illegible] of sidewalks at [illegible] stations. Defendant's witnesses testified that it was raining and snowing all morning including the time of the accident, and the weather report showed that [illegible] the morning, [illegible] at 7:45 A. M. which continued until 7:[illegible] A. M. and that the temperature ranged from 31 to 32. Prior to 7:[illegible] A. M. on the [illegible], there had been no precipitation for twenty-four hours. It seems that there was also a contradiction between plaintiff's different witnesses as to whether the sidewalk in front of the [illegible] property, plaintiff's father wore rubbers and [illegible] shoes.

All witnesses, it seems, agreed that at the time of the accident the entrance way was [illegible]. Plaintiff's father testified that this entrance [illegible] from one-quarter to one-half inch [illegible] the [illegible], while another witness for [illegible] testified that [illegible] to the outer two feet of the entrance way [illegible] sidewalk. The [illegible] way itself was built over the [illegible], so that any snow falling in the entrance way would [illegible] than on the sidewalk, and [illegible] due to the slope.

So, when we come to consider the evidence, there was a contradiction as to some of the facts and, of course, was for the jury to pass upon. The question that seems to be important is whether the defendant was negligent. Store-keepers are not insurers that their premises are safe. Their only duty is to exercise ordinary care to that end. As we have already said, the entrancewaay was surfaced with smooth terrazzo and inclined upwards toward the door; and, as we have indicated, the question is, was the defendant guilty of negligence in permitting the entrancewaay to be in the condition that was testified to by the witnesses. If there was any dispute or contradiction in their testimony, that would be a question for the jury to pass upon.

The defendant cites two cases of the Appellate Division of New York, the first of which is Dudley v. Abraham, 11[illegible] App. Div. 480; 107 N. Y. Supp. 97, where the plaintiff sought to recover for injuries sustained when she slipped on some water or grease on the floor of defendant's store. The question in that case was whether the trial court erred in dismissing the plaintiff's action, and upon that question the court said:

> "No jury could do more than guess from this what the plaintiff slipped on, if she slipped at all. But if it could be found to be grease, or fruit, or some other slimy or slippery substance, there was no evidence that the defendants put it there, or that it had been there long enough for them to see it and clean it up. There is no way to prevent people, especially children, from dropping things on floors. And if it was only water, the case is the same. There is no evidence that it came from the fountain. And it could not have come from there unless some one threw it on the floor needlessly or mischievously. It would be more reasonable to suppose that some child wet the floor, a thing common enough. * * *"

and the court then further said:

> " * * * It would be going altogether too far, and encouraging the bringing of cases like this, of which there are already too many, to hold as matter of law that this case was for the jury. O'Bielay v. L. I. R. Co., 4 App. Div. 139, 38 N. Y. Supp 779; id., 15 App. Div. 79, 44 N. Y. Supp. 264; Kelly v. Otterstedt, 80 App. Div. 398, 80 N. Y. Supp. 1008."

The second case called to our attention is that of Long v. Orion, 223 App. Div. 536, 228 N. Y. Supp. 533, in which plaintiff sought to recover for injuries sustained when she slipped in a little pool of oil on the floor of defendant's store. After discussing the facts in the case the court said:

So, when we come to consider the evidence, there is a contradiction as to some of the facts that, of course, was for the jury to pass upon. The question th[illegible] seems to be important is whether the defendant was negligent. Storekeepers are not insurers that their premises are safe. Their duty is to exercise ordinary care to that end. As we have already said, the [illegible] with smooth terrazzo [illegible] towards [illegible]. As we have indicated, the question is, was the defendant guilty of negligence in permitting the entrance-way to be in that condition [illegible] to by the witnesses. If there was any liability or contribution in their testimony, that would be a [illegible] for the jury to [illegible].

The defendant cites two cases of the Appellate Division of New York, the first of which is [illegible] v. [illegible], [illegible] N. Y. Supp. 327, where the [illegible] to recover for injuries sustained when she fell [illegible] on the floor of defendant's store. The question in that case [illegible] the trial court erred in dismissing the complaint [illegible], and upon that question the court said:

> "The jury could decide [illegible] plaintiff alleged so, if she did so [illegible] be found to be true, or [illegible] subsistence, there was no evidence that the defendants [illegible] or that it had been there long enough for them to [illegible] clean it up. There is no way to prevent people, especially children, from throwing things on floors. [illegible] case is the same. There is no evidence that it came from the counter. And it could not have come from [illegible] there it on the floor negligently or designedly. It [illegible] more reasonable to [illegible] thing common enough."

The court then further said:

> " " " It would be quite unreasonable [illegible] bringing of cases like this, [illegible] to hold as matter of law that this [illegible] v. [illegible], [illegible] 7. [illegible] 7b, 24 N. Y. Supp. [illegible] v. [illegible] 398, 80 N. Y. [illegible]."

The second case cited to [illegible] v. [illegible] 292 App. Div. 1[illegible] to recover for injuries [illegible] of all on the floor of defendant's [illegible]. [illegible] there in the case the court said:

" * * * No attempt is made to show how or by whom the oil spot was created, nor as to how long it had existed; so far as appears, it may have come into existence between the time that plaintiff entered the store and when she started to leave, and may have been caused by some person having no connection whatsoever with defendants. As has been said, it is not sufficient for her to show that the oil was there; she must go further, and show its presence under circumstances sufficient to charge defendants with responsibility therefor."

In discussing this case, we are controlled by the rule that the plaintiff, she being a child of tender years, could not be charged with negligence, or by any act of hers contribute to the bringing about of this accident. As we have said, a store keeper is not an insurer, nevertheless he is required to maintain his premises that are used by the public and which he invites the public to use, in a reasonably safe condition. It appears from the testimony of the defendant's as well as plaintiff's witnesses that a slippery condition existed and that it was defendant's custom to place a mat in the entrancewy when such a condition existed, but at the time in question the mat was not in the entrancewy. The plaintiff cites the case of Pabst v. Hillman's 233 Ill. App. 547, upon the question involved in the present litigation. The court, in reversing the judgment non obstante veredicto of the trial court, said the following in its opinion:

"The defendant was obligated under the law to use reasonable care to have maintained the aisles of its store in a reasonably safe condition for the safety of its customers and patrons of its store, but this it failed to do, as the reasonable inference is that the string bean upon which plaintiff stepped, had through the negligence of defendant, fallen from an overfilled hamper or basket containing string beans, and such negligence on the part of the defendant was the proximate cause of the injury to the plaintiff."

And again plaintiff refers to the case of Roberts v. Economy Cabs, Inc. 285 Ill. App. 434, where this court said:

"When a thing which caused an injury is shown to be under the management of the party charged with negligence and the accident is such as in the ordinary course of things will not happen, if those who have such management use proper care, the accident itself affords reasonable evidence, in the absence of an explanation by the parties charged, that it arose from want of proper care."

and also in support of plaintiff's position, they cite the case of Belcher v. John M. Smythe Co., 243 Ill. App. 85. In that case, a

" . . . No attempt is made to show how or at what time the oil spot was created, nor is it for long, if [illegible], as far as [illegible], it may have come into existence [illegible] the time [illegible] entered the store and when the accident [illegible], or may have been caused by some person having [illegible] negligently [illegible] defendants. As has been said, it is not sufficient for [illegible] show that the oil was there; the fact is further, and when its presence under circumstances sufficient to [illegible] with responsibility therefor."

In discussing this case, as [illegible] by the [illegible] that the plaintiff, who being a child of tender years, could not be charged with negligence, or by any act of his contributed to the bringing about of this accident. [illegible] there appears is not an insurer, nevertheless is required to maintain his premises that are used by the public and that he invites the public to use, in a reasonably safe condition. [illegible] the liability of the defendant's as well as plaintiff's [illegible] condition existed and for [illegible] in the entrance way such a condition existed, but at the time in question the mat was not in the entrance way. The [illegible] the case of Lust v. Illmann's [illegible], [illegible], [illegible] involved in the present litigation. [illegible] judgment non obstante veredicto [illegible] in its opinion:

"The defendant was only required under the law to use reasonable care to have maintained the premises in such state as a reasonably safe condition for the safety of its customers. No attempt of its store, but there is a fact to be [illegible] is that the mat [illegible] the negligence of defendant, taken upon [illegible] market constituting [illegible] of the defendant [illegible] plaintiff."

and again [illegible] to the [illegible]

"88 Ill. App. 471, were this so it [illegible]

"When a thing which causes an injury is shown to be under the management of the party on [illegible] is such as in the ordinary course of things [illegible] those who have such management [illegible] afforde reasonable evidence, in the absence of [illegible] the mattes occurred, that it came [illegible]

and also in support of plaintiff's [illegible]

Wagner v. John [illegible]

roll of linoleum was in the store and fell, due to interference by the child, and as a result the child was injured. The court held the store liable and said "The child, being under 7 years, was incapable of any negligence."

So, when we come to consider the facts of this case it seems that there was not any negligence properly chargeable against this plaintiff, nor as we have stated before, she could not have been guilty of contributory negligence. Of course, defendants theory is that the child was only a licensee and not an invitee for the reason that defendant did not have any goods in its store that could be sold for the use of the child. The father carried the child into the store for the purpose of exchanging a pair of shoes which he had previously purchased in the store. He carried the child into the store to transact the business, which defendant invited. While it is true that a store which is open for the general public is required to maintain its premises in reasonably safe condition, naturally, when it invited the father to come into its store and purchase shoes, which he afterwards wished to exchange, the father could not very well leave the child out in the open, she being of tender years, and there is nothing to indicate that any notice was given that children were not welcome in the store. It seems that defendant owed some duty to warn the public if it did not desire to have children in the store nor to be liable for injuries sustained by them while in the store, due to the storekeeper's negligence.

In the case of Grogan v. O'Keefe, 367 Mass. 183; 168 N. E. 721, the court said upon the question of a minor as an invitee, as follows:

> "In the instant case the evidence warranted a finding that there was an implied invitation to Mrs. Grogan to use the premises of the defendant in so far as they were maintained by it as a retail store; and warranted the further finding that such invitation by well known custom and usage was intended by the defendant to extend to and include her small children who could not safely be left alone or conveniently entrusted to the care of others." (Citing cases, Plummer v. Dill, 156 Mass. 426; 31 N. E. 128; Holbrook v. Aldrich, 168 Mass. 15; 46 N. E. 115; Murphy v. Huntley, 251 Mass. 555; 148 N. E. 710; Howlett v. Dorchester Trust Co., 358 Mass. 544;

roll of linoleum was in the store and fell, due to interference by the child, and as a result the child was injured. The court held the store liable and said "the child, being under 7 years, was incapable of any negligence."

So, when we come to consider the facts of this case it seems that there was not any negligence [illegible] contributing to this plaintiff, nor as we have stated above, she could not have been guilty of contributory negligence. [illegible], Judge [illegible] that the child was only a licensee and not an invitee for the reason that defendant did not have any goods in its store that could be sold for the use of the child. The father [illegible] the child into the store for the purpose of exchanging a pair of shoes (which he had previously purchased in the store. He carried the child into the store to transact the business, which defendant invited. While it is true that a store which is open for the general public is invited to enter in its premises in reasonably safe condition, naturally, when it invites the father to come into its store [illegible] [illegible] child out in the open, the [illegible] to indicate that any notice was given to [illegible] in the store. It seems to [illegible] [illegible] could if it did not desire to have [illegible] liable for injuries sustained [illegible] storekeeper's negligence.

In the case of [illegible] v. [illegible], [illegible] 721, the court said [illegible] follows:

"In the instant [illegible] the evidence was [illegible] there was an implied [illegible] of the defendant in so [illegible] retail store and [illegible] by well known custom and [illegible] extend to and include her [illegible] left alone or contributorily [illegible] cause. Hunter v. Hill, 168 [illegible] 168 N. E. 18; 66 A. L. R. 1; Murphy v. [illegible] 88; 142 N. E. 7; 31; Morales v. [illegible]

153 N. E. 835; O'Rourke v. Marshall Field & Co., 307 Ill. 187; 138 N. E. 635, 27 A. L. R. 1014.)

However, our attention has been called to Donk Bros. Coal and Coke Co. v. Lenvitt, 108 Ill. App. 385, where the court passed upon a like question and said:

> "Before the law a child of such tender age cannot of its own volition acquire the status of being either a trespasser a visitor or a licensee, nor are we referred to any authority which gives the mother, or father, or any other custodian of the child, power to fix its status before the law, when the rights of the child itself are concerned. The doctrine of imputed negligence has been repudiated in this state." Citing Chicago City Railway Company v. Wilcox, 138 Ill. 370.

From the facts as they appear, the verdict and judgment were not excessive. There are no questions that are called to the attention of this court that the court erred in admitting evidence offered by plaintiff, or that instructions given were erroneous; but the sole question is whether the defendant is liable for the accident as it happened in the entranceway to defendant's store. We are of the opinion that the court was not in error in entering judgment on the verdict of the jury.

AFFIRMED.

DENIS E. SULLIVAN, P.J. and [illegible], J. concur.

182 N. Y. 396; O'Rourke v. Metropolitan Elevated R. Co., 90 Ill. 147; 138 N. Y. 620, 27 C. L. J. 1014.)

However, our attention has been called to Long Island Lumber and Coke Co. v. Lemvitt, 104 Ill. App. 188, where the court passed upon a like question and said:

"Before the law shall of such tender age cannot of its own volition exercise the status of being either a trespasser a visitor or a licensee, nor can it [illegible] to any [illegible] which gives the mother, or if dead, or any other relation of the child, power to fix its status [illegible] the rights of the child itself are concerned. The doctrine of imputed negligence has been repudiated in this state. Chicago City Railway Company v. Hickey, 108 Ill. 223.

From the facts as they appear, the verdict and judgment were not excessive. There are no questions that are called to the attention of this court that the court erred in admitting evidence offered by plaintiff, or that instructions given were erroneous; but the sole question is whether the defendant is liable for the accident as it happened in the entrance-way to defendant's store. In one of the opinion that the court was not in error in entering judgment on the verdict of the jury.

[illegible]

DENIS E. SULLIVAN, [illegible] Ill. App. 4. [illegible].

STATE OF ILLINOIS

APPELLATE COURT

October Term, A. D. 1939

Term No. _____ Agenda No. _____

| | | |
|---|---|---|
| THE PEOPLE EX REL HAZEL STANLEY, Plaintiff-Appellee, | ) | Appeal from the County Court of Randolph County |
| -vs- | ) | |
| RAY HUNSAKER, Defendant-Appellant. | ) | Honorable William G. Jurgens Presiding Judge |

306 I.A. 476

DADY, J.

This proceeding was brought under the Bastardy Act. On March 3, 1938, Hazel Stanley filed her complaint before a justice of the peace against the defendant Ray Hunsaker, who is the appellant herein, charging that she was an unmarried woman and had been delivered of a male child, which by law would be deemed a bastard, and that the defendant was the father of said child. On August 24, 1938, the defendant was duly bound over to the county court of Randolph County to answer such charge. All proceedings thereafter were had in the county court of said county.

On December 19, 1938, an order was entered in said cause stating that the defendant was in court in person as well as by his attorney, H. E. Skinner, and was arraigned and pleaded not guilty, and ordering that an issue be made up and tried by a jury as provided by the statute, and that the case be set for trial on January 16, 1939. On January 16, 1939, an order was entered continuing the cause to January 23, 1939. On January 23,

STATE OF ILLINOIS

APPELLATE COURT

October Term, A. D. 1966

Term No. _____

| | |
|---|---|
| THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, | Appeal from the Circuit Court of Cook County. |
| -vs- | |
| RAY BURNSIDE, Defendant-Appellant. | Honorable William J. Chanes, Judge Presiding. |

MAY 1.

This proceeding [illegible] of the peace [illegible] appellant herein [illegible] had been delivered [illegible] a warrant, and that the [illegible] on August 19, 1966, [illegible] county court of [illegible] proceeding [illegible]

On December [illegible] stating that the [illegible] the attorney [illegible] guilty, and [illegible] jury as provided [illegible] total on January 18, 1967. On January [illegible] entered confirming the [illegible] on January [illegible]

1939, an order was entered ordering that the cause be passed "until the following case is disposed of." On January 24, 1939, an order was entered defaulting defendant, which order states that thereupon a jury was impanelled and that the jury having heard the evidence returned a verdict finding that Hazel Stanley was an unmarried female, that she had been delivered of a bastard child, and that the defendant "is the father of said child." The court then entered judgment on the verdict and ordered that defendant pay a certain sum and give bond, as provided by the statute.

No further proceedings were had until February 25, 1939, when there was filed in said cause a written motion to vacate the "default and judgment of conviction of the defendant." This motion was signed by H. E. Skinner as attorney for defendant, and was sworn to by defendant.

On March 22, 1939, the State's Attorney filed in said cause his motion in writing to strike such motion of the plaintiff. Attached to and made a part of the motion of the State's Attorney was an affidavit by the State's Attorney. No affidavit in reply was filed by the defendant or his counsel.

On April 3, 1939, the court entered an order allowing the motion of the State's Attorney and denying the motion of the defendant. This proceeding is brought to review the propriety of this last order.

The record is silent as to whether any evidence was introduced or offered at such last hearing. For the purpose of this

1939, an order was entered ordering that the cause be [illegible]
until the following case is disposed of. On [illegible], 1940,
an order was entered definitely [illegible] that [illegible]
that thereupon a jury was impanelled and sworn, and jury having
heard the evidence returned a verdict finding [illegible] defendant
was an unmarried female; that she had been delivered of a bastard
child, and that the defendant was the father of said child. The
court thus entered judgment on the verdict and ordered that
defendant pay a certain sum for [illegible], as [illegible] of the
statute.

No further proceedings were had until [illegible],
when there was filed in said [illegible] motion to vacate the
default and judgment [illegible] which motion
was signed by [illegible] and
sworn to by defendant.

On [illegible], [illegible] the [illegible]
[illegible] his motion in [illegible]
Attached to said motion [illegible]
such an affidavit by the [illegible] was
was filed by the defendant [illegible].

On April 2, 1940, the [illegible]
motion of the defendant [illegible]
defendant. This proceeding is [illegible]
their last order.

The record in [illegible]
[illegible]
chosen or offered on such last hearing. [illegible]

decision we will assume no such evidence was offered.

There is no dispute on the material facts set forth in the two motions. Defendant and his attorney were in court on December 19, 1938, at which time the cause was set for trial on January 16, 1939, over the objection of defendant's counsel, such counsel stating he expected to go to Florida. On January 9th the State's Attorney mailed a letter to defendant's counsel at Marion, Illinois, advising counsel that the trial of the case would be continued from January 16th to January 23rd. Counsel received such letter on January 10, 1939, and before going from Illinois to Florida. Counsel states that after receiving such letter, "and having already greatly inconvenienced himself by postponing his trip in behalf of his health," he "went about his business of seeking relief from a condition from which he had been suffering for over two months," and went to Florida [but the date of his leaving Illinois is not stated]. On or about January 19th the State's Attorney received a letter from such counsel dated Miami, Florida, January 16th, in which letter counsel asked for a continuance to a later date. On receipt of such letter and on January 19th the State's Attorney sent and defendant's counsel received a telegram stating that "client will not consent to continuance. Letter follows airmail." On January 19th the State's Attorney mailed by airmail a letter addressed to such counsel at Miami stating he was unable to agree to a continuance, "so I must insist" that "case be tried on the 23rd," and "I would suggest that you wire" defendant and let him get another attorney to represent him. Counsel for defendant admits

this letter was received by him "about two days" after January 19th. On January 19th the State's Attorney mailed a letter addressed to the defendant at Marion, Illinois, stating that the State's Attorney was unable to agree to a continuance and suggesting that defendant get some other attorney to represent him. Enclosed in this letter was a copy of the airmail letter. Defendant denies that he received such letter. On February 16th the State's Attorney mailed a letter addressed to defendant at Marion, Illinois, advising him of the trial and final judgment so had on January 24th. It is not denied that the defendant received this letter in due course of mail. Counsel states that "as soon as counsel returned to the State of Illinois" (the date of the return not being given) "and the immediate necessity of attendance on matters then pending in the circuit court were disposed of" he communicated with the State's Attorney and on February 21st received information "that on January 23rd a default was taken" and a verdict rendered against defendant and that immediately thereafter counsel prepared such motion. Defendant's motion states that defendant has a good and meritorious defense in that "at the time of the alleged pregnancy" of prosecutrix and for more than two months before and after "said date" defendant was absent from Illinois and did not have and could not have had an opportunity of having sexual intercourse with prosecutrix.

More than thirty days having expired after the entry of the judgment sought to be set aside by the motion of the defendant before the filing of such motion, such motion was necessarily filed under Section 72 of the Civil Practice Act, which provides:

"The writ of error coram nobis is hereby abolished, and all errors in fact, committed in the proceedings of any court of record, and which, by the common law, could have been corrected by said writ, may be corrected by the court in which the error was committed, upon motion in writing, made at any time within five years after the rendition of final judgment in the case, upon reasonable notice," etc.

In People v. Ogbin, 368 Ill. 173, the court said: "The function of the writ of error coram nobis was to bring the attention of the court to and obtain relief from errors of fact such as the death of either party pending the suit and before judgment therein; or infancy, where the party was not properly represented by guardian; or coverture, where the common law disability still exists; or insanity at the time of the trial; or a valid defense existing in the facts of the case but which, without negligence on the part of the defendant, was not made, either through duress or fraud or excusable mistake, these facts not appearing on the face of the record and being such as, if known in time, would have prevented the rendition and entry of the judgment. * * * The motion, however, is not intended to relieve a party from the consequences of his own negligence."

Briefly stated, in the case at bar, the court at all times had jurisdiction of the subject matter and of the parties; defendant was under no disability; the case was duly and regularly tried and disposed of; defendant and his counsel were fully and in apt time

advised of and knew, or in the exercise of reasonable care should have known, when the trial would take place, yet defendant and his counsel negligently and wilfully ignored the court; and there was no fraud, misrepresentation or misconduct on the part of the State's Attorney.

In our opinion the order of April 3, 1939, was properly entered.

Affirmed.

O.K.

[illegible]

Abstract

STATE OF ILLINOIS

APPELLATE COURT

Term No. 8 Agenda No. 7

| | | |
|---|---|---|
| THE PEOPLE EX REL HAZEL STANLEY, Plaintiff-Appellee, | ) | Appeal from the County Court of Randolph County. |
| vs. | ) | Hon. William G. Jurgens, Presiding Judge. |
| RAY HUNSAKER, Defendant-Appellant. | ) | |

DADY, J.

This proceeding was brought under the Bastardy Act. On March 3, 1938, Hazel Stanley filed her complaint before a justice of the peace against the defendant, Ray Hunsaker, who is the appellant herein, charging that she was an unmarried woman and had been delivered of a male child, which by law would be deemed a bastard, and that the defendant was the father of said child. On August 24, 1938, the defendant was duly bound over to the county court of Randolph County to answer such charge. All proceedings thereafter were had in the county court of said county.

On December 19, 1938, an order was entered in said cause stating that the defendant was in court in person as well as by his attorney, H. E. Skinner, and was arraigned and pleaded not guilty, and ordering that an issue be made up and tried by a jury as provided by the Statute, and that the case be set for trial on January 16, 1939.

On January 16, 1939, it was ordered that the cause be continued to January 23, 1939.

On January 23, 1939, it was ordered that the cause be passed "until the following case is disposed of."

On January 24, 1939, an order was entered giving the State's Attorney leave to file an amended complaint and defaulting the defendant.

ABSTRACT

STATE OF ILLINOIS

APPELLATE COURT

Term No. 8 Appeal from [illegible]

THE PEOPLE EX REL
HAZEL BRANDEY,
Plaintiff-Appellee,

vs.

RAY HUNSAKER,
Defendant-Appellant.

Direct from Circuit Court of [illegible] County.

[illegible]

JACK, J.

This proceeding [illegible] March 2, 1959, Hazel Brandey filed her petition before [illegible] of the verdict against the defendant, [illegible] Joseph, charging that he did [illegible] of a male child, which by law [illegible] the defendant was the father of said child. [illegible] the defendant was duly found [illegible] County to answer such charge. [illegible] in the county court of said county.

[illegible] stating that the [illegible] attorney, [illegible] and ordering that [illegible] by the statute, [illegible]

On [illegible] to January 22, 1962.

[illegible]

"Until the [illegible]

[illegible]

Attorney [illegible]

A jury then returned a verdict finding among other things that the defendant was the father of the child in question. On that date judgment was entered on the verdict.

Thereafter the defendant duly made a motion in writing to vacate the order of January 24th and grant a new trial. The trial court denied this motion, and the only question raised by this appeal is the propriety of the trial court's action in denying such motion. This motion was supported by affidavits which, if true, show due diligence and a meritorious defense. The State's Attorney filed counter affidavits.

Defendant's counsel was in the State of Florida from about January 9, 1939, until after January 24, 1939, and defendant was not in court in person on January 16th, 23rd or 24th, 1939.

The motion, affidavits and counter affidavits raised a serious question as to whether the defendant had his day in court,- whether he or his attorney had due notice of the entry of any of said last three orders, and particularly of the fact that the case would be tried on January 24th.

We do not deem it necessary to discuss in detail the affidavits or counter affidavits. In view of the seriousness of the charge and the doubt which we have as to whether the defendant had his day in court, we feel that justice will be best served by reversing and remanding the cause for a new trial.

The cause is reversed and remanded with directions to the trial court to vacate the judgment of that court entered on January 24th, 1939, and to grant a new trial.

Reversed and remanded.

FILED
JUL 2 1940
David G. Mallett
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

FILED
OCT 2 1970
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

9542

Transcrs — App. Adv. St. 4

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 7th day of May, in the year of our Lord one thousand nine hundred and forty, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice
Hon. BLAINE HUFFMAN, Justice
Hon. FRANKLIN R. DOVE, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff

306 I.A. 477

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BE IT REMEMBERED, that afterwards, to-wit: On [illegible] the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

Gen. No. 9542 Agenda No. 30

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MAY TERM, A. D. 1940

W. H. DYER, Administrator of the estate of Volney Ellsworth Love, deceased,

Appellant

vs.

Appeal from Circuit Court of Kankakee County.

Martin Dooley, Receiver, etc., (Floyd H. Goff, Successor Receiver to Martin Dooley, Receiver of the First National Bank of Momence, Illinois, et al).

Appellees.

HUFFMAN - J.

Mr. V. E. Love and wife Anna, had a joint savings account in the First National Bank of Momence, and Mr. Love had a checking account in said bank, at the time it suspended business. Mr. Love filed a claim with the receiver of the bank, based upon the above deposits. The receiver issued a certificate of proof of claim, in the total amount of $2621.32. Dividends were paid by the receiver on the above certificate, from time to time.

Mrs. Love died in April, 1935, leaving her husband and two daughters, appellee Elnora Post and Elvira Hayden. In May, 1936, Mr. Love died. Appellant Dyer was appointed administrator of his estate in the county court of Kankakee county. Following his appointment as such administrator, and on April 29, 1937, he filed a petition in the county court against appellee Elnora Post, for the discovery of assets, same being directed toward certain alleged assets of the estate, including the receiver's certificate issued for the above deposits. A hearing was had in the county court upon such petition, wherein the court found that by virtue of an instrument in writing signed by appellee Elnora Post and Mr. Love, a joint tenancy with right of survivorship was created, which included among other

items the receiver's certificate issued for said deposits. In that hearing the county court found the amount that had been previously paid upon such certificate by way of dividends, and the amount remaining due, and decreed appellee Elnora Post to be the sole owner of such certificate and entitled to receive all subsequent dividends paid thereon. No appeal from the decree of the county court in that case was ever taken by appellant administrator.

Following the disposition of the hearing in the county court, appellant instituted this proceeding in the Circuit Court, on December 6, 1937, directed against the receiver of the bank only, praying that all future dividends upon the receiver's certificate be ordered paid to appellant as administrator of Mr. Love's estate. This present action is based upon the claim that Mr. Love was the sole owner of the money on deposit in the bank represented by the receiver's certificate, and that at the time of his death, he was the sole owner of such certificate. Whereupon, it is alleged that the future dividends thereon should be ordered paid to appellant administrator.

Appellee Elnora Post, secured permission of the Circuit Court to intervene in this present proceeding. By her pleadings and counterclaim she alleged the prior proceedings in the county court relative to this receiver's certificate; further alleging that after her mother's death, she and Mr. Love entered into the written agreement whereby a joint tenancy with right of survivorship was created as to certain items of property, among which was the receiver's certificate in question; also setting up the proceedings previously had relative thereto in the county court, together with the disposition of such question by that court. She denied the right of appellant to any part of future dividends that might be paid upon the certificate. She further averred that the money in the savings account, which was the entire deposit with the exception of $20.00, was money that had come to her mother from sources other than by gifts or earnings of Mr. Love; and that it was carried in a joint account by her parents as a matter of convenience for them; that her sister Elvira Hayden, had assigned to her all interest she had in the estate of Mr. Love.

items the receiver's certificate issued for said deposits. In that hearing the county court found the amount that had been previously paid upon such certificate by way of dividends, [illegible] the amount remaining due, and decreed appellee Elnora [illegible] to be the sole owner of such certificate and entitled to receive all subsequent dividends paid thereon. No appeal from the decree of the county court in that case was ever taken by appellant administrator.

Following the disposition of the [illegible] the county court, appellant instituted this proceeding [illegible] the Circuit Court, on December 6, 1937, directed against the receiver [illegible], praying that all future dividends [illegible] certificate be ordered paid to appellant as administrator [illegible] estate. This present action is based upon [illegible] sole owner of the [illegible] deposit [illegible] receiver's certificate, [illegible] the sole owner of such certificate. [illegible], it is alleged that the future dividends thereon [illegible] paid to appellant administrator.

Appellee Elnora [illegible] to intervene in the present proceeding [illegible] counter-claim [illegible] to this [illegible]

[illegible]

of [illegible] The [illegible]

to [illegible] then from [illegible]

[illegible]

of conveyance for Mary [illegible] her sister [illegible] to her all interest she had in the estate [illegible].

As above stated, the county court in the proceeding had before it, in the summer of 1937, relative to certain assets which appellant by his petition sought discovery of and claimed were property of Mr. Love's estate, found that such property was not that of the estate, but pursuant to a written instrument signed by appellee Elnora Post and Mr. Love, there was a joint tenancy with right of survivorship created in certain described property, among which was the receiver's certificate in question in this case, issued in the principal amount of $2621.32, and that she was the sole owner of such property.

The trial court in this case, in November, 1939, rendered its decree in favor of appellee Post with respect to the receiver's certificate involved herein, finding that by virtue of the previous decree of the county court declaring said appellee to be the owner of the certificate in question, that she thereby became the legal owner of such certificate and entitled to dividends to be paid thereon. The Circuit Court further found that appellant, as the administrator of the estate of Mr. Love, had no right, title or interest in this certificate, and decree was entered for appellee Post. It is from this decree of the Circuit Court that appellant prosecutes this appeal.

We find that the decree as entered by the Circuit Court, is supported by the evidence. Finding no errors in the record, the decree is affirmed.

Decree affirmed.

As above stated, the county court in the proceeding had before it, in the summer of 1927, relative to certain assets which appeared by his petition sought discovery of and claimed were property of Mr. Love's estate, found that such property was not part of the estate, but pursuant to a written instrument signed by appellee Albert Ost and Mr. Love, there was a joint tenancy with right of survivorship created in certain described property, and that the receiver's certificate in question in this case, issued in the principal amount of $2621.32, and that she was the sole owner thereof.

The trial court in this case, in November, 1927, rendered its decree in favor of appellee Ost, upon the report of the receiver and certificate involved herein, finding that by virtue of the previous decree of the county court described, [illegible] of the certificate in question, [illegible] owner of such certificate and entitled [illegible] thereon. The Circuit Court further found that appellant, [illegible] of the estate of Mr. Love, had no [illegible] certificate, and hence was entitled [illegible] this decree of the Circuit Court [illegible] ...

We find that the decree as entered by the Circuit Court, is supported by the evidence. [illegible] decree in affirmed.

[illegible]

STATE OF ILLINOIS, }
SECOND DISTRICT } SS.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
*Clerk of the Appellate Court*

9549

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 7th day of May, in the year of our Lord one thousand nine hundred and forty, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice
Hon. BLAINE HUFFMAN, Justice
Hon. FRANKLIN R. DOVE, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WEITER, Sheriff

306 I.A. 504

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BE IT REMEMBERED, that afterwards, to-wit: On JUN 28 1940 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

GEN. NO. 9549 AGENDA NO. 9

IN THE APPELLATE COURT OF ILLINOIS,

SECOND DISTRICT

MAY TERM, A.D. 1940.

| | | |
|---|---|---|
| CARL W. KELLMAN, Appellee, | ) | |
| vs. | ) | APPEAL FROM CIRCUIT COURT DEKALB COUNTY. |
| JOHN W. TILTON and VERDELLE TILTON, Appellants. | ) | |

HUFFMAN - J.

Appellant John W. Tilton was in jail under judgment of the Federal Court, whereby he had been sentenced to jail for six months and fined $2000. In response to a telephone call from a deputy sheriff, appellee went to the jail to see Tilton. Here, he says Tilton wanted him to help him secure an Executive pardon. Appellee says he investigated the matter and advised Tilton that he would accept such employment. Thereafter, appellee made trips about the country, including different states as well as the city of Washington. A pardon from the President was shortly issued for Tilton, whereby his release from jail was effected and the $2000 fine remitted. Appellee brings this suit for legal services rendered in connection therewith. The case was heard by the court and judgment rendered in favor of appellee and against appellants (Tilton and wife), for $750. Appellants appeal.

Appellants in their answer admit all essential facts, except they deny that they had any contract of employment with appellee;

deny the pardon was received as a result of his efforts; aver that such services as were rendered by him, were purely voluntary; that they arose through mutual political affiliation, and that because of this bond existing between them, appellee so rendered the services sued for.

The complaint avers liability on the part of both appellants. We do not find any evidence on the part of appellee tending to prove that Mrs. Tilton had anything to do with the relationship of attorney and client as between appellee and her husband. It is suggested by appellee that the wife should be liable under the family expense section of the statute (Ch. 68, sec. 15). This section has to do with expense of raising a family. Appellee makes reference to no like situation in this state, and we are not prepared to hold that attorney fees of a husband, incurred in a criminal proceeding, shall be considered as expenses of the family under the above section.

The judgment herein is affirmed as to appellant John W. Tilton, and reversed as to appellant Verdelle Tilton. Costs to be taxed against John W. Tilton.

Judgment affirmed as to John W. Tilton.

Judgment reversed as to Verdelle Tilton.

deny the pardon was received as a result of his efforts; even such such services as were rendered by him, were purely voluntary; that they arose through mutual political affiliation, and that because of this bond existing between them, appellee rendered the services sued for.

The complaint avers liability on the part of defendants. We do not find any evidence in the record tending to prove that Mr. Hilton had anything to do with the relationship of attorney and client in between appellee and the mayor. It is suggested by appellee that the wife should be liable under the family expense section of the statute (Sec. 65, sec. 12). This section has to do with expense of raising a family. Appellee cites reference to the like situation in this state, and we are not prepared to hold that attorney fees of a husband, incurred in a criminal prosecution, should be considered an expense of the family under the above section.

The judgment rendered in favor of the complaint for . Hilton, and reversed as to appellee Mrs. Hilton. Costs to be taxed against Mrs. . Hilton.

Judgment reversed as to Mrs. . Hilton.

Judgment affirmed as to Mr. Hilton.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

*Clerk of the Appellate Court*

9520

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 7th day of May, in the year of our Lord one thousand nine hundred and forty, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice
Hon. BLAINE HUFFMAN, Justice
Hon. FRANKLIN R. DOVE, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff

306 I.A. 504 2

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BE IT REMEMBERED, that afterwards, to-wit: On [illegible] the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

GEN. NO. 9520 AGENDA NO. 2

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

May Term, A.D. 1940,

| | |
|---|---|
| JOHN H. ZIMMERMAN, Appellant, vs. SAM GARAFOLO; JAMES GARAFOLO; THOMAS GARAFOLO; DARL GAYTON; T. M. ELLIS, JR., AND ANN L. ELLIS, his wife; ROCK RIVER LUMBER & FUEL COMPANY, a corporation; THOMAS SHULER; B. F. LYONS and ETHEL W. LYONS, his wife, and "UNKNOWN OWNERS," and E. W. LYONS, Appellees. | APPEAL FROM THE CIRCUIT COURT OF WINNEBAGO COUNTY |

DOVE, J.

On December 7, 1936 John H. Zimmerman, a heating and plumbing contractor, filed his complaint to foreclose a mechanic's lien on certain property owned by T. M. Ellis, Jr. and Ethel W. Lyons. These defendants answered and the Rock River Fuel and Lumber Company, another defendant, filed its counter-claim seeking to foreclose its lien for lumber and material furnished by it. The issues made by the pleadings were heard by the chancellor who found that neither the plaintiff nor the counter-claimant were entitled to a lien upon the premises and from a decree dismissing the complaint and counterclaim for want of equity, the plaintiff appeals.

The record discloses that the premises described in the complaint and counter-claim are located in South Beloit, Winnebago County, Illinois and in 1934 were improved by a street car barn approximately 40 feet in width and 120 feet in length and used at one time by the Beloit Traction Company. On May 12, 1934, the then owners of the property, T. M. Ellis, Jr. and Ethel W. Lyons entered into a written lease with the defendants Earl Gayton and James Garafolo, by the provisions of which the lessors leased said premises to the lessees for two years commencing June 1, 1934, with an option to extend the lease for a further period of two years provided the lessees had fully complied with all the provisions and conditions of said lease. The lease provided that the lessees should have the premises without paying rent therefor from June 1, 1934 to February 1, 1935, that for the remaining four months of the first year, the lessees should pay $50.00 per month in advance and for the second year should pay $75.00 per month. It is recited in the lease that it was the intention of the parties thereto that the leased property was to be used by the lessees as a tavern or for any other legitimate business purpose and it was expressly provided that the lessors were under no obligations to make any repairs, alterations or improvements of any kind or character, but that if repairs, alterations or improvements were made that then the lessees should make the same at their own expense and subject to the approval of the lessors and that before any alterations or improvements were undertaken, the lessees should provide the lessors with a contractor's waiver of lien. About the time the lease was executed, the lessors furnished and paid for the necessary brick and materials which were used to brick up the large entrance, fourteen feet wide and nineteen

feet high and to repair and partially reroof the building, the lessees paying the labor bills in connection therewith.

After the lease was executed, the lessees commenced their alterations and repairs and improvements and caused to be installed a new floor covering a large portion of the building and erected several partitions and a bar, the materials of which were furnished by the Rock River Fuel and Lumber Company.

Sam Garafolo is a brother of James Garafolo and Thomas Garafolo is the father of Sam and James Garafolo. The Plaintiff, John H. Zimmerman has been engaged in the heating, plumbing and sheet metal business in Beloit, Wisconsin, since 1902. He testified that he was acquainted with Sam and Thomas Garafolo and in May 1934 entered into an oral contract with Sam by the terms of which he was to furnish and install, together with the necessary fixtures and labor, the urinals, lavatories, bar fixtures and necessary plumbing at the regular and customary prices, which Garafolo might require to be installed in the tavern, and that Sam Garafolo agreed to pay him at the rate of $50.00 a month therefor. That he began his work on May 18, 1934, and during the course of his work, he furnished and installed certain plumbing fixtures and connected them with soil pipe and drains, made the necessary bar connections and lined bar boxes. His bill of particulars and the evidence shows that this was done between May 18, 1934 and June 13, 1934. On June 17, 1934, the tavern opened for business.

On July 5, 1934, appellant was requested by Garafolo to install a vent in one of the closets and on July 23, 1934, he constructed a new well and moved certain fixtures. On August 23, 1934, he repaired

feet high and [illegible] the [illegible], the
[illegible] .

After the [illegible] [illegible]
aircraft [illegible]
a new floor [illegible]
several [illegible]
by the [illegible] .

[illegible]
in the [illegible]
[illegible]
business [illegible]
was [illegible]
into an [illegible]
[illegible] the [illegible]
the vehicle, [illegible]
[illegible]
installed [illegible]
the [illegible]
[illegible]
installed [illegible]
[illegible]
Dorsal [illegible]
was [illegible]
the [illegible] .

[illegible]
a [illegible]
[illegible]

a leak in a closet tank and on August 25, 1934 repaired and set an oil heater. The evidence further discloses that on or about August 29, 1940, the plaintiff, at the request of Sam Garafolo installed two used Round Oak furnaces which the lessors had at another location and which they permitted Sam Garafolo to have hauled to the tavern. On September 10, 1934, he furnished the material and covered the back bar. On October 18, 1934 he moved a sink from one location to another. On November 2, 1934 he moved certain fixtures and furnished material therefor to the amount of $22.25 and did work in connection therewith amounting to $31.50. On November 5, 1934 he cleaned the closet for which he made a charge of $1.50. On November 20, 1934, a water tank was installed and on November 27, a range boiler for heating water was hooked up to one of the furnaces. On December 7, 1934, the bar was moved to another part of the building which necessitated a change in the plumbing. On December 23, 1934 the chimney was repaired and a tank connected with a stove. On December 27, 1937 some little work was done on a table used in connection with the bar and a sink was moved.

As stated, the Rock River Lumber and Fuel Company furnished the flooring that was used to cover the pit of the car barn and the lumber that went into the construction of partitions, bar and the remodeling of the inside of the building and its claim for a lien was filed on April 11, 1935, and its counterclaim, was filed on January 15, 1937. The evidence disclosed that only two boards were delivered by it to the premises within two year's previous to January 15, 1937, and that these boards were used by the leasee to repair a broken table and were wholly unconnected with the building. The Chancellor correctly held that the Lumber and Fuel Company was not entitled to a lien and the correctness of the decree in dismissing its counterclaim is not challenged in this court.

a leak in a closet [illegible] oil heater. The evidence further [illegible] 25, 1940, the plaintiff, [illegible] two used [illegible] and [illegible] On September 1, 1941, [illegible] ber. [illegible] (On November [illegible], 1941 [illegible] [illegible] amounting to [illegible] which he [illegible] was installed [illegible] was [illegible] was given to [illegible] for [illegible] [illegible] [illegible] was [illegible].

At the [illegible] the plaintiff [illegible] lumber [illegible] remodeling [illegible] use [illegible] January 11, 1942, [illegible] delivered [illegible] 1[illegible], 1951, [illegible] a [illegible] Thereafter [illegible] entitled to [illegible] lien [illegible] consolidated [illegible].

The Chancellor held that the contract between the lessees acting through Sam Garafolo and the plaintiff was fully completed prior to December 7, 1934, and that the material which the plaintiff furnished thereafter and the labor which he thereafter performed and within the two years immediately preceeding the filing of the complaint were not lienable, had nothing to do with the original heating or plumbing contracts, did not come under the head of extra or additional work and therefore appellant was not entitled to a lien upon the premises of the lessors. This holding is sustained by the evidence. Both the plumbing and heating contracts were completed more than two years before the instant complaint was filed. So far as the plumbing work was concerned it was completed and the tavern had been open for business almost six months prior to December 7, 1934. It is true that thereafter he did some repair work, changed the location of some of the fixtures, connected the sink, repaired some leaks and finally on February 20, 1936, he furnished 25 pounds of fireline and relined the furnace for which he charged for labor and material $9.05. The evidence of appellant is that all the plumbing work was done in May or June, 1934, and the tavern had been in operation since June 17th of that year. Also according to his testimony, the work in connection with the heating contract, was completed on November 1, 1934. Furthermore in his claim for a lien which appellant filed on February 9, 1935, he referred to his contract with Sam Garafolo as one by which he was to furnish work, labor and materials in repairing and installing plumbing and that his contract was completed on December 24, 1934. The work which he did on December 24, 1934 was to set up an oil-burning kitchen cook stove which the evidence discloses was purchased by Sam Garafolo from Fred Witte. Appellant set up an outside oil tank and make the necessary

connections therewith and furnished some ten joints of eight-inch smoke pipe leading to the chimney to carry off the fumes. In our opinion, this work had no connection with the plumbing contract upon which he relies and the findings and decree of the Chancellor is sustained by the evidence and must be affirmed.

The lien here sought to be enforced is not based on the claim that the owners engaged appellant to do any work for them, but that they, as owners, knowingly permitted work to be done by one employed by those to whom they had leased their premises and the theory underlying the cases holding an owner liable for work done pursuant to the order of a lessee is that it would be unjust to permit the owner to knowingly obtain additions and improvements to his real estate and not be liable for the same as it would be an unjust enrichment. Owners of property have the right to protect themselves by providing that those who furnish material and perform labor may waive their lien and look solely to the person who employs them. This is what was done in the instant case. Sam Carafolo testified that when he employed appellant in May 1934 to do the plumbing, he told him that he had the premises leased for two years and that he then handed him the lease to read. This is not denied by appellant either in his pleadings or by his testimony and having knowledge of this condition appellant cannot now insist that he has an enforcible lien.

The motion of appellees to tax the costs of the additional record and abstract to appellant is allowed and the decree of the Circuit Court of Winnebago County is affirmed.

Decree affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
*Clerk of the Appellate Court*

7539

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 7th day of May, in the year of our Lord one thousand nine hundred and forty, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice
Hon. BLAINE HUFFMAN, Justice
Hon. FRANKLIN R. DOVE, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WEITER, Sheriff

306 I.A. 505

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BE IT REMEMBERED, that afterwards, to-wit: On the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

GEN. NO. 9539 AGENDA NO. 26

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

May Term, A. D. 1940

| | |
|---|---|
| PEOPLE OF THE STATE OF ILLINOIS FOR THE USE OF WALTER E. BOERGER, Appellee | APPEAL FROM THE |
| vs. | CIRCUIT COURT OF |
| JACK MARTIN, CHARLES VALLETTE, MILDRED VALLETTE, WILLIAM V. HOFF AND R. C. DAY, Appellants | DU PAGE COUNTY. |

DOVE, J.

This is a suit brought by The People of the State of Illinois for the use of Walter E. Boerger upon the official bond of Jack Martin, a constable. This bond was executed by Martin as principal and by Charles Vallette, Mildred Vallette and William V. Hopf, as sureties. The complaint consists of four counts and the first count charges that Martin, as constable, on July 3, 1939 by virtue of an execution issued by W. H. Johnson, a justice of the peace, upon a judgment rendered by said justice in favor of Day and against Walter E. Boerger, seized an automobile of Boerger upon which the Northern Illinois Finance Company had a chattel mortgage; that Boerger, on July 6, 1939 filed with the justice of the peace, a schedule of his personal property, that Martin refused to have the said scheduled property appraised and refused to return to Boerger

IN BANC

APPELLA[illegible]

BOARD OF [illegible]

---

[illegible] J. D. [illegible]

---

| | |
|---|---|
| PEOPLE OF THE STATE OF [illegible] FOR THE USE OF [illegible], | |
| Appellee | |
| vs. | |
| JACK MARTIN, [illegible] MILDRED WALTHUM, [illegible] AND E. O. [illegible], | |
| Appellees. | |

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DOYLE, J.

This is a suit instituted by the people of the State of Illinois for the use of Milner [illegible] against Jack Martin, a defendant. [illegible] was [illegible] and by [illegible] Walthum [illegible] E. [illegible], as [illegible]. The complaint [illegible] charges that Martin, [illegible] on [illegible] 1, 1939, [illegible] of the [illegible] conduction issued by [illegible] upon a judgment rendered [illegible] Justice [illegible] Milner [illegible] Martin [illegible] Northern Illinois [illegible] Denver, on July 5, 1939 [illegible] schedule of his property, [illegible] said scheduled property [illegible]

his automobile, resulting in Boerger being compelled to expend $200.00 for transportation while he was deprived of the use of his automobile. The second count charged that Martin, the constable, and Day, the judgment creditor, conspired to wrongfully deprive Boerger of his property and in furtherance of said conspiracy, Day caused an execution to be issued upon his judgment well knowing that Boerger had no property subject to execution; that Martin received the execution at 10 o'clock A.M. July 3, 1939, but withheld service thereof until 10 o'clock P.M. of that day in order to prevent Boerger from filing a schedule; that Martin refused to give Boerger a debtor's schedule blank; that Martin seized valuable documents belonging to Boerger and that on July 5, 1939, Martin illegally delivered Boerger's car to certain unknown persons. The third count charged that the automobile which Martin seized by virtue of the execution issued by the justice of the peace upon the Day judgment was exempt from levy and sold and that Martin knew that it was but illegally seized it and surrendered it to others without having any authority to do so. The fourth count was substantially the same as the third count. Attached to the complaint was a copy of the official bond of Martin and in addition to Martin and his sureties who executed said bond R. C. Day, the judgment creditor, was joined asa party defendant. All of the defendants answered admitting that Martin was constable and that he, as principal and the other defendants, except Day, executed the bond as alleged. Their answer also admitted that Martin seized the Boerger automobile under the Day execution and that it was, at that time, encumbered by a chattel mortgage executed by Boerger to the Northern Illinois Finance Corporation. Their answer further alleged that Martin surrendered

the control and possession of said automobile, after he had seized it upon said execution, to the Northern Illinois Finance Corporation after lawful demand therefor had been made upon Martin by said Finance Corporation. Their answer then denied practically all of the other allegations of the complaint. After the issues were made up the cause was heard by the court without a jury, resulting in a judgment in favor of the plaintiff for the use of Walter E. Boerger and against all of the defendants, including Day, in debt for $2,000.00 and for damages amounting to $210.00, said judgment provided that upon the payment of said damages with interest and costs that then said debt should be discharged. It is from this judgment that all the defendants have appealed.

Sec. 2, Par. 14 of Chap. 52 Ill. Rev. Stat. 1939 provides, among other things, that whenever any debtor against whom an execution has been issued, desires to avail himself of the benefits of the act to exempt certain personal property from sale on execution, that, he shall, within ten days after the copy of the execution is served upon him, make a schedule of all of his personal property and deliver the same to the officer having the execution writ, or file the same with the justice where the writ is issued and thereupon the justice, from whose court the execution issued, shall summon three householders to appraise the property of the debtor.

In the instant case, the evidence discloses that on July 3, 1939, William H. Johnson, a justice of the peace, rendered a judgment in favor of R. C. Day and against Walter E. Boerger, for $97.52, that an affidavit for an immediate execution was filed and an execution was issued that day and delivered to Jack Martin, a constable, to serve. Martin served the execution between nine and

the control and possession of said [illegible] oil, [illegible] seized it upon said execution, [illegible] Corporation after lawful demand [illegible] Martin by said Tunsco Corporation [illegible] practically all of the other [illegible] the leases were made up the [illegible] a jury, resulting in a judgment [illegible] use of water by [illegible] including pay, in debt for [illegible] $210.00, said judgment provided [illegible] damage with interest and costs [illegible] disembarged. It is from this judgment [illegible] appealed.

Tec. [illegible] among other things, however [illegible] tion has been issued, [illegible] the act [illegible] that, be said, [illegible] served upon [illegible] and deliver the [illegible] file the [illegible] upon the judgment, [illegible] answer there [illegible]

In the [illegible] 1923, [illegible] judgment in favor [illegible] $37.52, that an officer [illegible] an execution [illegible] corrable, [illegible]

ten o'clock that evening at the home of Boerger and at the time it was served, Boerger informed the constable that he did not have property amounting in value to $400.00 and that there was a mortgage upon his automobile to the Illinois Finance Company to secure the payment to $176.00 and that he claimed his automobile was exempt from being levied upon. The constable told him he was going to levy upon it and requested the keys to the car. Boerger refused to give him the keys and Martin procured a tow truck and hauled the car to Holstein's garage. The next day, Martin took the car to a parking lot used in connection with the garage of R. C. Day, the judgment creditor, and placed it there in the custody of R. F. Day, a son of R. C. Day. On July 6, 1939, Boerger filed a debtor's schedule with Johnson, the justice of the peace, and Martin was advised of that fact by Johnson.

Thereafter, the Finance Company foreclosed its mortgage, posted a sales notice on the car, and under the provisions of the mortgage, a sale was had on either July 17, 1939 or July 27, 1939 and Royal F. Day purchased the car at the sale. Subsequently, Martin returned the execution in no part satisfied.

Counsel for appellee insist that the car levied upon was exempt from levy and that in seizing appellee's automobile, Martin's official bond was breached. We do not think so. The evidence discloses that R. D. Day on July 3, 1939, secured a valid judgment against the beneficial plaintiff, Boerger, for $97.52 and that a valid execution was issued upon that judgment. This execution was delivered to Martin to execute. He did so by serving it upon the execution debtor, giving him notice to file a schedule and by seizing his automobile. This automobile, according to Boerger's testimony, was purchased by him on April 1, 1938

for $761.00 and on July 3, 1939 had a mortgage upon it to secure the payment of $176.00.

Upon Boerger filing his schedule with Johnson, the justice of the peace on July 6, 1939, it became his, Johnson's duty under the statute, to summon three householders to appraise the property of the debtor without delay. It was not the duty of the constable, Martin, to do this nor was it a breach of the constable's bond for Martin, the constable, to levy this execution upon this automobile before the expiration of the ten day period within which the debtor had a right, under the statute to schedule. In Lenzi vs. Zimmer, 210 Ill. App. 260, it was held that a sheriff may levy upon personal property immediately upon demand and is not required to wait until the expiration of ten days after the debtor is notified of the execution. See also Weskalnies vs. Hesterman, 288 Ill. 199 and Chrenka vs. Meyerling, 285 Ill. App. 594.

The fact that this automobile was subject to a prior lien to a Finance Company did not exempt it from execution nor was the Finance Company, which held this prior lien, precluded from foreclosing its mortgage simply because an execution had been levied thereon. Under the provisions of the note and mortgage which the Finance Company held, Boerger was in default. The Finance Company had a right to and did foreclose its lien and in accordance with the provisions of the mortgage and the statute it caused this automobile to be sold. None of the defendants in this proceeding are liable for the acts of the Finance Company.

The only charge against Day was contained in the second count of the complaint which alleged that Martin and Day conspired to unlawfully deprive Boerger of his automobile. This charge is not

[illegible]

sustained by the evidence. This is not an action for damages brought by Boerger against Day but is an action brought in the name of the People for the use of Walter E. Boerger and against Martin and his sureties upon his official constable's bond.

It has been held that to establish a cause of action against an execution creditor for wrongfully taking the property of the execution debtor in violation of the exemption laws, by the constable to whom the execution was delivered, the evidence must disclose that the execution creditor advised, director or encouraged the abuse of process complained of or knowing of its abuse, and for his own benefit, ratified it. Besserman vs. Votupal, 292 Ill. App. 355. If Martin, the constable, was guilty of any wrongful acts the fact that Day caused the execution to issue and be delivered to Martin does not establish a liability against Day. Besserman vs. Votupal, Supra.

In our opinion, the allegations of the complaint are not supported by the evidence and the judgment rendered against appellants cannot be sustained. The judgment of the Circuit Court of Du Page County will therefore be reversed and the cause remanded.

Reversed and remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
*Clerk of the Appellate Court*

9566

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 7th day of May, in the year of our Lord one thousand nine hundred and forty, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice
Hon. BLAINE HUFFMAN, Justice
Hon. FRANKLIN R. DOVE, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WEITER, Sheriff

306 I.A. 505

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BE IT REMEMBERED, that afterwards, to-wit: On [illegible] the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

Gen. No. 9566 Agenda No. 29

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

May Term, A. D. 1940

MANDUS DEMAY, Administrator of the Estate of Harold DeMay, deceased,

Appellee

vs.

Robert Brew and John C. Brew,

Appellants

Appeal from the Circuit Court of Henry County

DOVE, J.

This is an action brought by the Administrator of the Estate of Harold DeMay against Robert Brew and John C. Brew to recover damages for the alleged wrongful death of Harold DeMay. From a judgment for $5000.00 in favor of the plaintiff and against both of the defendants, the record is brought to this court for review.

The complaint consisted of two counts. The first count charged, among other things, that the automobile which struck plaintiff's intestate belonged to John C. Brew, the father of Robert Brew and that Robert was driving it with the knowledge and consent of his father. The second count charged, in addition, that at the time of the collision, Robert Brew was operating the car as agent of John C. Brew and as such agent was delivering groceries from Galva to the Midland Country Club for his father and in the performance of his duties as agent, committed the wrongful act charged. In addition to the general charge of negligence, the complaint alleged that the automobile was being driven by Robert Brew at an unreasonable and improper rate of speed and not on the right half of the highway and that the driver failed to keep a proper lookout and drove with a wilful and wanton disregard for the safety of persons on the highway. The answer of the defendants admitted the time and place of the accident, that plaintiff's intestate died as a

result of the injuries he received in the collision and that the automobile driven by Robert was owned by his father, John C. Brew. All other allegations of the complaint were denied. A guardian ad litem was appointed for Robert and he filed a separate answer calling for strick proof and denying all charges of negligence. At the close of the plaintiff's evidence, the charges of wilful and wanton misconduct were withdrawn from the consideration of the jury.

The evidence discloses that about two-thirty o'clock on the afternoon of July 5, 1939, Robert Brew, a young man of eighteen years of age, was driving his father's car north on Midland Country Club Road intending to go to the Midland Country Club. This road is a ten foot concrete slab of pavement with level shoulders of gravel and dirt on each side of the concrete nine feet in width. The Midland Road runs north from Route 34 two and one-half miles to the Midland Country Club. After leaving Route 34, it is level for a little more than three-quarters of a mile, at which point there is a dip of eight or ten feet, then the road goes up over a knoll, then a more pronounced dip and over another knoll, then another dip and over another knoll and then continues straight north. A storm was approaching on the afternooh in question and it was cloudy and dark. There was a strong wind blowing, and dust was in the air. The pavement and shoulders were dry. Robert Brew was alone in the car and after he had proceeded about three quarters of a mile north on the Midland Road, his car came into collisionwith a motorcycle being driven along this Midland Road in a southerly direction by Harold DeMay, a young man twenty-five years of age. DeMay was thrown from his motorcycle rendering him unconscious, and as a result of the collision sustained injuries from which he died shortly thereafter without regaining consciousness. As the judgment must be reversed for errors committed upon the trial of the cause, it will not be necessary to further review the evidence.

By the express provisions of the statute, Sec. 2, Chap. 51, Ill. Rev. Stat. 1939, Robert Brew and John C. Brew, the defendants, were incompetent witnesses and the trial court properly so held. Forbes v. Snyder, 94 Ill. 374. Nordman v. Carlson, 291 Ill. App. 438;

Ogden v. Keck, 253 Ill. App. 444. Mrs. Lena Brew, the wife of the defendant, John C. Brew, was also an incompetent witness. Hughes v. Medendorp, 294 Ill. App. 424: In re Estate of Teehan, 287 Ill. App. 58.

Whether the plaintiff's intestate was in the exercise of due care and caution at and prior to the time of the collision and whether Robert Brew was guilty of the negligence charged, and whether that negligence was the proximate cause of the death of Harold DeMay and whether John C. Brew was liable because the relationship of master and servant existed between him and his son Robert were issues presented by the pleadings. There was no competent occurrence witness and therefore evidence of the general habits of the deceased as to care and caution in driving and handling his motorcycle was admissible. Nordman v. Carlson, Supra. The testimony of the several witnesses as to statements made by Robert as to the rate of speed he was traveling and the portion of the road he was traveling upon at the time of the collision and his further statements that it was dark and he did not see any one coming and did not know that he had had an accident until shortly after he struck something, were all admissions against his interest and tended, when taken in connection with the other evidence found in the record, to prove plaintiff's allegations of negligence.

Counsel for appellee offered and the court admitted in evidence over the objections of appellants a diagram or plat identified as plaintiff's exhibit one. The evidence disclosed that this diagram or plat was prepared by Julian P. Wilamoski, an attorney not connected with this litigation, at the court house during the trial of this case. Mr. Wilamoski testified that shortly after the accident, he went with George Nelson, a police officer of Kewanee, to the hospital where Harold DeMay had been taken and there talked to Robert Brew. Later he went to the scene of the accident and upon arriving there, he met H. F. Reed, a police officer of Galva. He testified that he observed some oil and glass to the west of the center line of the pavement, also a burnt rubber mark made by a tire

Ogden v. Keck, 253 Ill. App. 444. [illegible] defendant, John C. Shaw, was also an [illegible] v. [illegible], 254 Ill. App. 424: [illegible], 247 Ill. App. 58.

Whether the plaintiff's [illegible] due care and caution at and prior to the [illegible] whether Robert Shaw was [illegible] the negligence was the proximate cause [illegible] and whether [illegible] matter and proved [illegible] were issues presented by the lead [illegible] ness and [illegible] to cause the accident in [illegible] misable. Goldman v. Gorlin, [illegible] witnesses as to have [illegible] was traveling and [illegible] the time of the collision [illegible] John and he did [illegible] had an accident with [illegible] admissions against [illegible] with the proper evidence [illegible] illegality of negligence.

Counsel for appellee [illegible] over the objections of [illegible] plaintiff's counsel [illegible] or that the [illegible] [illegible] with John [illegible] of the car. [illegible] the work [illegible] hospital where [illegible] Robert Shaw. [illegible] arriving there, [illegible] testified that [illegible] center line of the pavement, [illegible]

of an automobile on the pavement and some notches or gouges in the pavement; that he also observed some blood and flesh on the shoulder west of the west edge of the pavement and south of the oil and glass which he had testified about. He also testified that he observed a mat, a saddle bag, a shoe and a portion of a saddle bag and a motorcycle, all lyingwest of the west edge of the pavement and that he saw the Brew automobile east of the east edge of the pavement quite a distance north of where he observed the oil and glass on the pavement. He further testified that officers Nelson and Reed stepped off the length of the skid mark and distances between the various objects about which he testified while he was there and that he made a note of these distances as given him by the officers and made a diagram while there at the scene of the accident. While the trial was in progress it was from these notes and memoranda that he made the diagram or plat which was admitted in evidence upon the hearing. He further testified that after making this exhibit, he tore up and threw away his original notes, memoranda and diagram and the reason he gave for making the new diagram was that the original one was not drawn to scale, whereas, one inch on the exhibit is equivalent to twenty feet.

The exhibit locates, by crosses, the several places on the pavement and shoulders where the oil and glass, blood and flesh, motorcycle, mat, saddle bag, shoe, part of the saddle bag, and car were found. It indicates the names of the several articles and locates the skid mark by a heavy black line and the location and length of the notches or gouges in the pavement by a broken line. It gives the distance of these v arious marks and indicates the distance between the various articles and objects about which he testified. On the east side of the mark designating the east edge of the pavement there appears this legend, "gravel and earth shoulder 9' " and this is followed by some lines and irregular markes. No shoulder is shown on the west side of the pavement. The evidence was conflicting as to where the skid mark and notches began with reference to the oil and glass found on the pavement as well as the distance

[illegible]

they continued. The evidence was also conflicting as to the location of the oil and glass and of some of the other objects indicated. This diagram also called especial attention to the skid mark, it being indicated by a particularly heavy line. The evidence is that within a very few minutes after the collision a heavy rain fell and more than one hour had elapsed after the collision before Mr. Wilamoski and officers Nelson and Reed got to the scene of the accident, and when they arrived there, several cars were there and others were moving in both directions and Nelson took charge and kept the traffic moving so there would be no congestion. The memoranda or marks concerning matters about which the evidence was conflicting should have been eliminated from this exhibit and appellants objection thereto, as offered, should have been sustained as this exhibit contained matter which, in our opinion, was not proper. Oral evidence of witnesses cannot be incorporated into a diagram and thereby reach the jury room. Justen v. Schaaf, 175 Ill. 45: Zinser v. Sanitary District, 175 Ill. App. 9: Burns v. Salyers, 270 Ill. App. 46. It was also error for the court to orally instruct the jury as to this exhibit. Sec. 67 Civil Practice Act.

The Court gave the jury the following instruction:

> "The court instructs the jury that the defendant, John C. Brew by his pleadings in this case under the law admits that he was the owner of the automobile in question, and that the defendant Robert Brew was operating said automobile at the time of the accident, and the law presumes from such admission of ownership and operation of the car that the defendant Robert Brew was the agent or servant of the defendant, John C. Brew: acting within the scope of his employment at the time of the accident, and the jury are further instructed that this presumption will prevail unless it is overcome by all the facts and circumstances shown by the evidence in this case, and if the jury finds from a preponderance of the evidence in the case that at the time of the accident in question the defendant Robert Brew was the agent or servant of the defendant John C. Brew and acting within the scope of his employment and if the jury further finds from the evidence in this case that at the time of the accident the defendant Robert Brew was guilty of negligence and that the plaintiff's intestate Harold DeMay was in the exercise of due care for his own safety at the time of the accident as explained in these instructions, then and in such case you should find the defendants Robert Brew and John C. Brew guilty."

This instruction is objected to because it does not limit the

negligence to that charged in the complaint, but authorizes a recovery for any negligence of the defendant Robert Brew. This instruction directs a verdict and should have limited the jury to the negligence or wrongful conduct charged against the defendant in the complaint. Garnhart, Administratrix v. Reeves, 288 Ill. App. 159: Herring v. C. and A. R.R. Co., 299 Ill. 214: Seybold v. Zimmerman, 294 Ill. App. 138. Furthermore in order to warrant a recovery, it was essential that the death of plaintiff's intestate be shown to have been proximately caused by the negligence of the defendant. Clare v. Bond County Gas Co., 267 Ill App. 437.

The court also gave to the jury the following instruction:

> "The jury are instructed that while as a matter of law, the burden of proof is upon the plaintiff and it is for him to prove his case by a preponderance of the evidence, still, if the jury find that the evidence bearing upon the plaintiff's case preponderates in his favor, although but slightly, it will be sufficient for the jury to find the issues in his favor."

This same instruction was condemned in Reivitz v. Chicago Rapid Transit Co., 327 Ill. 207 at page 210 and again in Molloy v. Chicago Rapid Transit Co., 335 Ill. 164, and also in Wolczek v. Public Service Company, 342 Ill. 482. In the Molloy Case, Supra, at pages 171-2, it was said:

> "Instructions similar to this one have been criticised by this court in many cases. The instruction first states that it is for the plaintiff to prove her case by the preponderance of the evidence, and refers to the evidence bearing on plaintiff's case without any statement as to what the case is or what it is necessary for her to prove, but it refers the whole case to the jury without any limitations. It opened the door for the jury to take any view of plaintiff's case which they saw fit to take and to arrive at a verdict for any reason which might seem to them to be sufficient, without any rule to guide them. An instruction must limit the right of recovery to the negligence charged in the declaration. (Herring v. Chicago and Alton Railroad Co. 299 Ill. 214; Hackett v. Chicago City Railway Co. 235 id. 116; Ratner v. Chicago City Railway Co. 233 id. 169.) This part of the instruction was erroneous. The instruction also erroneously told the jury that if they found that the evidence bearing upon plaintiff's case preponderated in her favor, although but slightly, it would be sufficient to find the issues in plaintiff's favor. This part of the instruction has also been criticised on many occasions. It indicated that the preponderance of the evidence was a small matter, and sought to minimize, and thus reduce to the lowest limit, the requirement of a preponderance of the evidence."

negligence to that charged in the complaint, but [illegible] recovery for any negligence of the defendant [illegible]. This instruction directs a verdict and should have [illegible] the jury to the negligence of which [illegible] in the complaint. Crandall, [illegible] Ill. App. 159; Herring v. C. and A. [illegible] Co., [illegible] Ill. [illegible] v. Zimmerman, 224 Ill. App. 138. Furthermore [illegible] to warrant a recovery, it was essential that the [illegible] be shown to have been proximately [illegible] of the defendant. [illegible]

The court also gave to the jury [illegible] instruction:

[illegible]

[illegible]

[illegible] a small matter, and ought to [illegible] to the lowest limit, are required [illegible] to the evidence.

The Court gave nineteen instructions on behalf of the plaintiff. Several of them did not confine the jury to the evidence nor require the plaintiff to prove the negligence charged by a preponderance of the evidence. Instruction number five was not only an abstract proposition of law but, when applied to the facts as disclosed by this record, assumed that the deceased was confronted with sudden danger and then told the jury that the obligation resting upon him to exercise ordinary care for his own safety did not require him to act with the same deliberation and foresight which might be required under ordinary circumstances. This instruction should have been refused.

For the errors indicated the judgment of the Circuit Court is reversed and the cause remanded.

Reversed and remanded.

The Court gave direction [illegible] in favor of the plaintiff. [illegible] not require the plaintiff [illegible] preponderance of the evidence. [illegible] only on a [illegible] proposition [illegible] the finding [illegible] with undue [illegible] upon him to [illegible] him to not give the [illegible] requested [illegible] been refused.

For the reasons [illegible] the Circuit Court is reversed and the cause [illegible].

[illegible]

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
*Clerk of the Appellate Court*

41045

FRANK F. TRACY,
Appellee,

vs.

BEN YOST, et al.

SELECT OPERATING CORPORATION,
a Corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

135

306 I.A. 578

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal the Select Operating Corporation, a corporation, garnishee, seeks to reverse an order entered July 31, 1939, denying its motion to vacate the judgment entered against it June 22, 1939, and for leave to file affidavits and its special appearance.

The record discloses that plaintiff on March 10, 1937, had a judgment against defendant Ben Yost and afterward there was a judgment against certain garnishees, including the Select Operating Corporation. An appeal was taken from the judgment against the defendant and the garnishees to this court where the judgment against Yost, the defendant, was affirmed and reversed as against a certain garnishee not involved here, and reversed and the matter remanded as to the garnishee, Select Operating Corporation. (#40024, Tracy v. Yost, Appellate Court First District, opinion filed June 30, 1938.) Afterwards, March 4, 1939, notice was served on counsel for the garnishee who prosecutes this appeal that March 6, 1939, the mandate of this court would be filed and that plaintiff would ask the court to reset the matter for hearing at an early date. The mandate was filed March 6, and an order entered by the Chief Justice of the Municipal court in accordance with the mandate of this court. The next that we find in the record before us is that on June 22, the court heard the cause and rendered judgment against the garnishee. July 21, counsel for the garnishee served notice that they would appear in the Municipal court and ask leave to file a special appearance for the garnishee and move to vacate the judgment of June 22, and in support of the motion

FRANK F. TRACY,
Appellee,

vs.

BEN YORT, et al.

SELECT OPERATING CORPORATION,
a Corporation,
Appellant.

306 I.A. 578

MR. PRESIDING JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

By this appeal the Select Operating Corporation, a corporation, garnishee, seeks to reverse an order entered July 21, 1939, denying its motion to vacate the judgment entered against it June 22, 1939, and for leave to file affidavits and its special appearance.

The record discloses that plaintiff on March 10, 1937, had a judgment against defendant Ben Yort and attempted there was a judgment against certain garnishees, including the Select Operating Corporation. An appeal was taken from the judgment against the defendant and the garnishees to this court where the judgment against Yort, the defendant, was affirmed and reversed as against a certain garnishee not involved here, and reversed and the matter remanded as to the garnishee, Select Operating Corporation. ( 4T0S4, Tracy v. Yort, Appellate Court First District, opinion filed June 22, 1938.) Afterwards, March 4, 1939, notice was served on counsel for the garnishee who prosecutes this appeal that March 6, 1939, the mandate in this court would be filed and that plaintiff would ask the court to reset the matter for hearing at an early date. The mandate was filed March 6, and an order entered by the Chief Justice of the Appellate Court in accordance with the mandate of this court. The next but a line in the record before us is that on June 22, the court after the cause and rendered judgment against the garnishee. July 21, counsel for the garnishee served notice to a jury would appear in the municipal court and ask leave to file a special appearance for the garnishee and move to vacate the judgment of June 22, and in support of the motion

would submit affidavits. July 21, the court entered an order which recites that the garnishee "moves the Court to vacate the judgment of June 22nd, 1939, which motion the Court orders entered and continued." The order further recites that plaintiff moves the court to strike the motion of the garnishee, which was also continued and July 31, the order appealed from, as above stated, was entered.

The garnishee contends that the court was without jurisdiction to enter the judgment against it on June 22, for the reason that only two days' notice of plaintiff's motion was given, while the statute requires ten days' notice before a cause may be re-docketed after remandment. (§88, ch. 110, Ill. Rev. Stats. 1939.) The statute provides for ten days' notice, as counsel contends, and it has been held that unless ten days' notice is given "No step could be taken in the cause remanded *** until it should be reinstated in pursuance of a statutory notice." People v. Conway, 261 Ill. 26.

Counsel for plaintiff agrees that the law is as counsel for the garnishee contend but say the giving of ten days' notice may be waived and Austin v. Dufour, 110 Ill. 85; Gage v. The People, 223 Ill. 410, 415 and other authorities are cited. Obviously the giving of ten days' notice may be waived. In the Gage case the court said: "The sole purpose of the statute requiring ten days' notice of the filing of the remanding order is to advise the opposite party that the cause is to be re-instated in the trial court."

Plaintiff contends that the garnishee waived the giving of the ten days' notice because the record discloses a number of orders, continuing the case, were entered by the court after the order of March 6, and before the matter was heard on June 22; that on July 21, 1939, when the garnishee's motions to vacate the judgment, etc. were heard, it appeared that when the matter came up before Judge Sonsteby on March 6, one of defendant's counsel appeared and objected to the notice of March 4, and Judge Sonsteby asked counsel for the garnishee who appeared either to waive his objection to the notice or that a

would submit affidavits. July 21, the court entered an order which recited that the petitioner "moves the Court to vacate the judgment of June 22nd, 1959, which motion the court duly considered and sustained." The order further recited that plaintiff's counsel had agreed to strike the motion of the petitioner, which was also continued. July 31, the order appealed from, as above stated, was entered.

The petitioner contends that the court was without jurisdiction to enter the judgment against it on June 22, for the reason that only two days' notice of plaintiff's motion was given, while the statute requires ten days' notice before a cause may be re-instated after remandment. (ARS, ch. 110, Par. 101. Ill. Rev. Stats. 1959.) The statute provides for ten days' notice, as counsel contends, and it has been held that unless ten days' notice is given "a step should be taken in the cause remanded and until it should be reinstated in pursuance of a statutory notice." Moore v. Hamer, 287 Ill. 40.

Counsel for plaintiff agrees that the law is as counsel for the petitioner contend but say the giving of ten days' notice may be waived and Austin v. Hatcher, 16 Ill. App. 68; Moore v. The People, 287 Ill. 410, 415 and other authorities are cited. Obviously the giving of ten days' notice may be waived. In the Moore case the court said: "The sole purpose of the statute requiring ten days' notice of the filing of the remandment order is to advise the parties that the cause is to be re-instated in the trial court."

Plaintiff contends that the petitioner waived the giving of the ten days' notice because its counsel, Alexander [illegible], counsel of record, continuing the case, were advised by the court after the [illegible] March 8, and before the matter was heard on June 22; that on July 21, 1959, when the petitioner's motions to vacate the judgment, etc., were heard, it appeared that when the matter came on for [illegible] on March 8, one of defendant's counsel appeared and objected to the notice of March 8, and Judge [illegible] said counsel for the petitioner who appeared either to waive the objection to the notice or that a

new notice would have to be served, and that since the court then entered the order "it is reasonable to assume that Mr. Sinden [counsel for garnishee] then and there waived the defect."

The praecipe for record in the instant case calls for all orders entered and the clerk certifies the record is complete in accordance with the praecipe. No order appears in the record showing any of the orders continuing the case, which appear to have been entered between March 6 and June 22. On the hearing before the court [June 22] of the garnishee's motion to vacate the judgment against it, the record discloses the court examined the "half-sheet" from which the court said it appeared that on "March 6th Judge Sonsteby set this case for trial in [room] 1105 [City Hall]; on March 21st Mr. Sinden came in and was granted a continuance to April 6th; on April 6th was granted a continuance again to May 4th; it was then continued until May 18th; on May 18th continued to June 19th; on June 19th continued again to June 22nd. On June 22nd was the date I heard the case. I recall distinctly your calling the Court's attention to the fact that Counsel was in the court during all the procedure and likewise made no objection whatever."

No contention was made on the hearing of the garnishee's motion that what the court said was not shown by the "half-sheet" nor is there any such contention made in the brief filed in this court. So it is obvious the record in this court does not contain all of the orders entered in the matter, and if counsel for garnishee had the matter continued on his motion, obviously the failure to gain the ten day notice was waived. But counsel for the garnishee contend that although someone from the office was present, he took no part in what was done after the order of March 6 was entered until they made their motion on July 21. And therefore they waived no defect in the notice given them to reinstate the matter pursuant to the mandate of this court. Whatever may be the fact, since we do not have the complete record before us on the question of waiver, we think the garnishee cannot prevail because, as counsel for plaintiff point out, the record is

new motion would have to be served, and that since the court then entered the order "it is reasonable to assume that [a. Linden [counsel for garnishee] then and there waived the defect."

The precedents for record in the district case fails for all orders entered and the clerk certifies the record is complete in accordance with the precedents. No order appears in the record showing any of the orders continuing the case, which appear to have been entered between March 6 and June 22. In the hearing before the court [June 22] of the garnishee's motion to vacate the judgment against it, the record discloses the court examined the "mail-sheet" from which the court said it appeared that on "March 6th Judge [illegible] set this case for trial in [room] 1108 [City Hall]; on March 1st [illegible] came in and was granted a continuance to April 6th; on April 6th was granted a continuance again to May 4th; it was then continued until May 18th; on May 18th continued to June 1st; on June 1st continued again to June 22nd. On June 22nd was the date I heard the case. I recall distinctly your calling the court's attention to the fact that Counsel was in the court during all the proceedings and Linden made no objection whatever."

No consideration was made of the inaccuracy of the garnishee's motion that what the court said was not given by the "mail-sheet" nor is there any such contention made in the brief filed in this court. So it is obvious the record in this court does not contain all of the orders entered in the matter, and it cannot [illegible] that the matter continued on his docket, [illegible] to which the ten day notice was waived. But counsel in the [illegible] court's that although someone from the office was there [illegible] was done after the order of [illegible] motion on July 21. And therefore they [illegible] notice given them to relitigate the matter [illegible] court. Whatever may be the fact, [illegible] record before us on the question of waiver. [illegible] not prevail because, as counsel for [illegible] the record is

to the effect that when the matter was heard and judgment entered against the garnishee on June 22, 1939, the garnishee took part on the hearing. We think this contention must be sustained. The judgment order of June 22 recites: "Now come the parties to this cause, and thereupon this cause comes onin regular course for trial before the Court without a jury, and the Court having heard the evidence and the arguments of counsel and being fully advised in the premises, enters the following finding, towit:-

'The Court finds the garnishment issues against Select Operating Corporation, a Corp., and assesses the damages at the sum of twenty eight hundred fifty & 91/100 dollars ($2850.91).'"

No motion was made to correct this recital of the judgment order in the trial court and it must be taken that it speaks the truth. In this circumstance, since it shows that the garnishee participated in the trial on the merits, the defect of the notice to re-instate the cause was waived. Austin v. Dufour, 110 Ill. 85.

The order of the Municipal court of Chicago appealed from is affirmed.

ORDER AFFIRMED.

Matchett, J. and McSurely, J., concur.

to the effect that when the matter was heard and judgment entered against the garnishee on June 22, 1959, the garnishee took part in the hearing. We think this contention must be sustained. The judgment order of June 22 recites: "Now come the parties to this cause, and thereupon this cause comes only regular court for trial before the Court without a jury, and the Court having heard the evidence and the arguments of counsel and being fully advised in the premises, enters the following finding, to-wit:-

'The Court finds the garnishment issue against Wiest Operating Corporation, a Corp., and assesses the damages at the sum of twenty eight hundred fifty & 00/100 dollars ($2850.00).'

No motion was made to correct this recital of the judgment order in the trial court and it must be taken that it speaks the truth. In this circumstance, since it shows that the garnishee participated in the trial on the merits, the defect of the notice in garnishee the cause was waived. Martin v. Nelson, 110 Ill. App.

The order of the municipal court of Chicago entered June 1, 1959 is affirmed.

Judgment affirmed.

McGoldrick, J. and McCurdy, J., concur.

41100

THOMAS P. LILLY, Appellant,

vs.

ATLAS COLLAPSIBLE TUBE COMPANY, a corporation, Appellee.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

306 I.A. 579

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover salary and expenses upon his contract of employment with defendant; the cause was referred to a master to take evidence and report; the master recommended that judgment be entered in favor of plaintiff in the sum of $4685.86; the trial court sustained exceptions to the report and entered judgment against defendant for $985.91; from this plaintiff appeals, asking that judgment be declared in his favor for the amount found by the master.

The master's report clearly states the points at issue, namely the construction of two resolutions adopted by defendant.

Defendant is in the business of manufacturing and selling collapsible tubes. Plaintiff was an officer and salesman of defendant and did practically all of the selling. He left defendant's employment in 1936, when a substantial amount was due him. Defendant claims it is entitled to deduct from this amount $3169.69, representing bad debts which appear on the books of defendant on accounts sold by plaintiff. Defendant bases this claim on a corporate resolution dated June 1, 1934. This resolution is in part as follows:

"On motion of Thomas P. Lilly and seconded by J. C. Steiner, that salaries remain the same, Frank Simek objected and said that some cut in existing salaries be made. Deferred until December meeting.

"On motion of Frank Simek and seconded by Joseph C. Steiner, that the corporation arrange to reduce salaries of officers and the question as to agents spending to a weekly allowance be taken into consideration. This was also deferred to December meeting.

4100

THOMAS P. KELLY,

Appellant,

vs.

ATLAS COLLAGENIC [illegible]
a corporation,

Respondent.

MR. JUSTICE [illegible]

Plaintiff brought suit to recover [illegible] upon his contract of employment with defendant. The cause was referred to a master to take evidence and report [illegible] that judgment be entered in favor of plaintiff [illegible] 88; the trial court sustained exceptions to the report [illegible] against defendant for [illegible]; from that [illegible] that judgment be declared in his favor [illegible] by the master.

The master's report [illegible] namely the construction of the [illegible] defendant is in the [illegible] collegiable under. Plaintiff [illegible] ant and did practically all [illegible] employment in 1926, when [illegible] claims it is entitled to [illegible] sending bad debts which [illegible] said by plaintiff. [illegible] resolution dated June [illegible]

"On motion of [illegible]
that salaries [illegible]
none out in [illegible]
meeting.

"On motion of [illegible]
Steiner, that the [illegible]
and the [illegible]
taken into consideration. [illegible]

"On motion of Frank Simek, it was ordered that accounts which are guaranteed either by Joseph C. Steiner or Thomas P. Lilly if unpaid or lost, such loss incurred be charged to respective agents bringing said accounts."

It appears this resolution was not adopted at any corporate meeting, but that the three directors, including plaintiff, signed it separately. Plaintiff attacks its validity, but the master found it was the intention of the directors to bind themselves and sustained it.

The last paragraph of the resolution reads, - "***it was ordered that accounts which are guaranteed either by Joseph C. Steiner or Thomas P. Lilly if unpaid or lost, such loss incurred be charged to respective agents bringing said accounts." The master construed this to bind plaintiff to stand such loss on such accounts as he might in the future guarantee, and, as the evidence showed that plaintiff did not at any time guarantee any account procured by him, defendant should not be allowed a credit of $3169.69, purporting to be a charge against plaintiff for bad debts. We hold that this construction is correct. Practically all of the accounts were brought in by plaintiff and it would be highly improbable that he would make a wholesale guaranty of all these accounts.

Although defendant appears to make the claim that plaintiff knew these charges were made against his account and inferentially acquiesced therein, the record does not support this. It rather shows, as plaintiff testified, that he first learned of these charges in the summer of 1936, after he had left defendant's employment.

Moreover, the principal loss incurred and which defendant seeks to charge against plaintiff was on an account sold several months prior to the date of the resolution and apparently this account was procured by both Mr. Steiner, vice-president and general manager of defendant company, and plaintiff. Also, the credit of the accounts sold were checked and approved by defendant. The trial court was in error in sustaining the exceptions to the report in this respect.

The master found that December 31, 1934, another resolution

"On motion of Frank Shaw, it was ordered that accounts which are guaranteed either by Joseph E. Steiner or Thomas E. Lilly if unpaid or lost, such loss incurred be charged to respective accounts belonging said accounts."

It appears this resolution was not adopted at any corporate meeting, but that the three directors, including plaintiff, signed it separately. Plaintiff attacks its validity, but the master found it was the intention of the directors to bind themselves and authorized it.

The last paragraph of the resolution reads, - "Shall was ordered that accounts which are guaranteed either by Joseph E. Steiner or Thomas E. Lilly if unpaid or lost, such loss incurred be charged to respective accounts belonging said accounts." The master construed this to bind plaintiff to stand such loss on such accounts as he might in the future guarantee, and, as the evidence shows that plaintiff did not at any time guarantee any account procured by him, defendant should not be allowed a credit of [illegible], proportion to be a charge against plaintiff for [illegible]. [illegible] construction is correct. Practically all of the accounts were procured in by plaintiff and it would be highly improbable that he would make a wholesale guaranty of all the accounts.

Although defendant attempts to prove the claim that plaintiff knew these charges were made against his accounts and intentionally acquiesced therein, the record does not [illegible]. It appears above, as plaintiff testifies, that [illegible] in the answer of [illegible], either [illegible].

Moreover, the principal [illegible] seeks to charge against plaintiff [illegible] on account [illegible] prior to the date of the resolution and [illegible] procured by both Mr. Steiner, vice-president [illegible] defendant company, and plaintiff. [illegible] said were checked and approved by [illegible] error in sustaining the exceptions on the [illegible].

The master found that [illegible]

was signed by the directors, including plaintiff. The motion was made to increase the common stock from $10,000 to $25,000; one of the directors objected saying he would not approve of this increase unless each one of the officers would accept the new stock at $150 a share. The resolution provided "that the amount due officers would be retired with increased capital stock at the rate of $150 per share, this to apply on the amounts due Frank Slmek, Joseph S. Steiner and Thomas P. Lilly." This resolution was passed and plaintiff received an additional 28 shares of stock, which, at $150 a share would amount to $4200, which was charged to his account. Defendant argues that this was intended to "wipe out" not only past due indebtedness to its officers, but also salaries earned thereafter up to March 15, 1935, the date the stock was issued. Both Steiner and plaintiff testified that they understood the resolution meant, practically, to "wipe out" past due salaries but not subsequent and Slmek, defendant's president and treasurer, although a little uncertain in his testimony, said he understood the resolution to mean "that we can't collect the salary that we have on the books." But regardless of this testimony the language of the resolution on this point is clear. The words "the amount due officers would be retired" with the new stock, and "this to apply on the amounts due," can only refer to the amounts due at the time the resolution was adopted, namely December 31, 1934.

The master correctly construed the resolution as intending to reduce at that time the indebtedness of the corporation to its officials by applying on their respective accounts the additional stock at the value agreed upon; that defendant was entitled to the credit of $4200 on its account with plaintiff, leaving a balance due him of $4685.86.

We hold that the trial court should have approved the master's report. The decree is therefore reversed and judgment for $4685.86 is entered in this court for plaintiff.

REVERSED AND JUDGMENT HERE.

O'Connor, P.J., and Matchett, J. concur.

was signed by the directors, including plaintiff. The action was made to increase the common stock from [illegible], one of the directors objected saying he would not approve of this increase unless each one of the officers would [illegible] a share. The resolution provided that the officers would be retired with increased capital stock [illegible] per share, this to apply on the amounts due them. [illegible] Steiner and Thomas [illegible] tiff received an additional [illegible] would amount to [illegible] argues that this was intended to "wipe out" not only [illegible] mass to its officers, but also salaries [illegible] 16, 1955, the date the stock was issued. [illegible] testified that they understood the resolution [illegible] "wipe out" past due salaries but not subsequent [illegible] president and treasurer, although [illegible] said he understood the resolution to mean "that [illegible] salary that we have on the books." [illegible] the language of the resolution [illegible] amount due officers would [illegible] apply on the amounts due," [illegible] time the resolution was adopted, [illegible]

The master correctly [illegible] to reduce at that time the [illegible] officials by applying on their [illegible] stock at the value agreed upon [illegible] credit of [illegible] on his account [illegible] sum of [illegible].

We hold that the [illegible] master's report. The score is [illegible] [illegible] is entered in this court [illegible]

O'Connor, P.J., and Latenser, [illegible] concur.

41145

GRANT HOSPITAL OF CHICAGO, Appellant,

v.

ALICE BIERFIELD, ALBERT S. BIERFIELD, SIDNEY OPPENHEIM, NICK GENE, Appellees.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

306 I.A. 579

MR. JUSTICE McBURNEY DELIVERED THE OPINION OF THE COURT.

Plaintiff filed a complaint to foreclose a trust deed given to secure payment of three notes aggregating $1150 of which $400 had been paid, leaving $750 due. Alice and Albert Bierfield, the makers of the notes and trust deed, answered admitting the indebtedness and alleging they were ready and had always been ready to pay the amount of the notes to the bona fide holder and owner. Defendant Nick Gene, filed a counterclaim alleging plaintiff was not the bona fide owner and holder of the notes described in the bill of complaint but that he himself was the legal owner and holder, and of the trust deed given to secure them.

The cause was referred to a master in chancery who after taking testimony found against the claim of plaintiff and found that Nick Gene was the true and lawful holder of the two notes and trust deed in question; exceptions were filed which were overruled by the chancellor, who decreed that plaintiff's complaint should be dismissed for want of equity, and Nick Gene was given judgment against the defendants Bierfield for the amount of the two notes, with interest to the date of maturity. No interest was chargeable after maturity against the makers on account of their tender to make payment to whoever should be adjudged to be the owner of the notes and trust deed.

Plaintiff appeals from the decree and correctly says that the only point is the ownership of the notes.

The master found that Alice Bierfield and her husband borrowed $1150 from Nick Gene and executed and delivered to him three promissory notes - two for $400 each and the third note for $350. They

GRANT HOSPITAL OF CHICAGO,
appellee,

v.

ALICE HINCHCLIFF, ALBERT S. [illegible],
SIDNEY STERNBERG, NICK GRE[illegible],
appellees.

[illegible] Court,
[illegible] County.

[illegible] 9(0) L.A. 373

MR. JUSTICE [illegible] delivered the opinion of the court.

Plaintiff filed a complaint to foreclose a trust deed given to secure payment of three notes aggregating [illegible] of which [illegible] had been paid, leaving $750 due. Alice and Albert [illegible], the makers of the notes and trust deed, answered admitting the indebtedness and alleging they were ready and had always been ready to pay the amount of the notes to the bona fide holder and owner. [illegible] Nick Gree, filed a counterclaim alleging plaintiff was not the bona fide owner and holder of the notes described in the bill of complaint and that he himself was the legal owner and holder, and of the trust deed given to secure them.

The cause was referred to a master in chancery who after taking testimony found against the claim of plaintiff and found that Nick Gree was the true and lawful holder of the notes and trust deed in question; exceptions were filed which were overruled by the chancellor, who decreed in [illegible] plaintiff's complaint should be dismissed for want of equity, and Nick Gree was given judgment against the makers and sureties for the amount of the two notes, [illegible] interest to the date of maturity. No interest was [illegible] after maturity [illegible] the matter on account of their tender to pay [illegible] be adjudged to be the owner of the notes and trust deed.

Plaintiff appeals from the decree and contends [illegible] only point is the ownership of the notes.

The master found that Alice [illegible] ed $1150 from Alice Gree and accepted and delivered [illegible] promissory notes - two for [illegible] each and the [illegible]

also delivered to Gene their trust deed conveying certain real estate to secure payment of these notes.

John Downs, who was an attorney at law representing Gene, obtained these notes and trust deed from Gene for the purpose, as he testified, of having them recorded; at that time Downs' wife was a patient in plaintiff's hospital and a Mr. Shepherd, superintendent of plaintiff, insisted on Downs securing her hospital bill. Downs testified he advised Shepherd that the only things he had were some notes and a trust deed belonging to his client Nick Gene; that he could leave them as a pledge for the payment of the hospital bill but would have to return them in the near future. He testified that he told Shepherd "they were not my property, I would have to return them at almost any time." Shepherd, testifying by deposition said he accepted the notes for the hospital in good faith with the understanding that Mr. Downs owned them. The master found that Shepherd accepted the notes upon the understanding as stated by Downs.

Subsequently, Shepherd advised Downs that it was necessary to perform an emergency operation on Mrs. Downs and they could not do this unless they had cash money. Later Downs paid $225 and Shepherd gave Downs the trust deed and the first of the Bierfield notes for $400. Shepherd in his deposition admits he took the notes and trust deed as security with the understanding that Downs would redeem them before due and that he obtained them from Downs "by threatening" to move Mrs. Downs from a private room to a ward.

The trust deed was in the possession of Gene when the instant suit was brought, and Shepherd would hardly have returned the trust deed if he had accepted it and the notes in good faith and for value; Shepherd must have known that they were not Downs' property. Moreover, plaintiff took no steps to recover on the two notes - the first of which matured February 1, 1937, and the second February 1, 1938 - until the instant suit was brought in September 1938.

Apparently, Gene did not know where the two notes were until

also delivered to them their trust deed conveying certain real estate to secure payment of these notes.

John Bowne, who was an attorney at law representing owne, obtained these notes and trust deed from owne for the purpose, as he testified, of having them recorded; at that time Bowne' wife was a patient in plaintiff's hospital and a Dr. Shepherd, superintendent of plaintiff, treated on Bowne securing her hospital bill. Bowne testified he advised Shepherd that the only things he had were the notes and a trust deed belonging to his client Dr. Owne; that he could leave them as a pledge for the payment of the hospital bill but would have to return them in the near future. He testified that he told Shepherd "they were not my property, I could have to return them at almost any time." Shepherd, testifying by deposition, said he accepted the notes for the hospital in good faith with the understanding that Mr. Bowne owned them. The master found that Shepherd accepted the notes upon the understanding as stated by Bowne.

Subsequently, Shepherd advised Bowne that it was necessary to perform an emergency operation on Dr. Owne and they could not do this unless they had cash money. Later Bowne with the mortgage gave Bowne the trust deed and the first of the checks being in 1400. Shepherd in his deposition stated he knew the notes are trust deed as security with the understanding that [illegible] before due and that he obtained them from [illegible] to move Dr. Bowne from a [illegible] to [illegible].

The trust deed was [illegible] stant suit was brought, and [illegible] trust deed if he had accepted it [illegible] value; Shepherd must have known that [illegible] However, plaintiff took no steps to [illegible] - the first of which matured February 1, 1920, [illegible] 1920 - until the instant suit was brought in [illegible].

Apparently, Bowne did not [illegible]

advised by the attorney for the Bierfields shortly before this action was commenced.

It might also be mentioned that as Downs was an attorney, Shepherd would probably accept his representation that the notes were put up merely as security, to be returned upon demand.

The master in his report and the chancellor in his decree found that Nick Gene was the true and lawful owner and holder of the principal notes aggregating $750 and the trust deed securing the same; that without his knowledge or consent they were pledged with the plaintiff as security for the personal obligation of Downs and that plaintiff was informed and had knowledge that Downs was not the true and lawful owner of the notes and trust deed.

Under such circumstances plaintiff was not an innocent holder for value and received no title as against the real owner, Nick Gene. People ex rel. Nelson v. Peoples Tr. & Sav. Bank, 276 Ill. App. 269; 49 C.J. 929.

The master's findings when approved by the chancellor are entitled to due weight on review of the cause, and the Supreme court has said that it would not be justified in disturbing them unless they are manifestly against the weight of the evidence. Smuk v. Hryniewiecki, 369 Ill. 546; Pasedach v. Auw, 364 Ill. 491; North Side Sash and Door Co. v. Hecht, 295 Ill. 515; Klekamp v. Klekamp, 275 Ill. 98.

We see no reason to disagree with the decree and it is affirmed.

DECREE AFFIRMED.

O'Connor, P.J., and Matchett, J., concur.

advised by the attorney for the Sheffields shortly before this action was commenced.

It might also be mentioned that as Jones was an attorney, Shepherd would probably accept his representation that the notes were put up merely as security, to be returned upon demand.

The master in his report and the chancellor in his decree found that Nick Jones was the true and lawful owner and holder of the principal notes aforesaid. 750 and the trust deed securing the same; that without his knowledge or consent they were placed with the plaintiff as security for the personal obligation of Jones and that plaintiff was informed and had knowledge that Jones was not the true and lawful owner of the notes and trust deed.

Under such circumstances plaintiff was not an innocent holder for value and received no title as against the real owner, Nick Jones. People ex rel. Nelson v. People Tr. & Sav. Bank, 272 Ill. App. 528; 49 C.J. 320.

The master's finding when approved by the chancellor was entitled to due weight on review of the court, and the supreme court has said that it would not be justified in disturbing them unless they are manifestly against the weight of the evidence. Lane v. Kuhlmann, 309 Ill. 546; Pasedagh v. Ben, 324 Ill. 431; Nolan Ins. Co. v. Bank, 295 Ill. 318; Kinnan v. Jackson, 272 Ill. 97.

We see no reason to disagree with the master and it is affirmed.

[illegible]

O'Connor, P.J., and Matchett, J., concur.

41016

RACINE FUEL COMPANY, an Illinois Corporation,
Appellee,

v.

DR. C. A. RAWLINS and JULIA NANKERVIS,
Defendants.

138

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

306 I.A. 580

On Appeal of DR. C. A. RAWLINS,
Appellant.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action designated as Count II of plaintiff's complaint and upon trial by jury, there was a verdict for plaintiff in the sum of $2,918.37. In response to interrogatories the jury answered that defendant Rawlins was guilty of wilful and wanton conduct as alleged in the complaint which caused the damages sustained by plaintiff and found that malice was of the gist of the action. Motions for a new trial and in arrest were overruled and judgment entered on the verdict. Defendant appeals.

It is urged there was a total lack of proof of fraud; that defendant's motion for a directed verdict in his favor at the close of all the evidence should have been granted; that the court erred in its rulings on the admission of evidence and in the giving of instructions and in the submission of the special interrogatories to the jury; further, that the conduct of the trial judge was prejudicial to defendant; and that there is no basis in the record for the verdict.

A judgment against Dr. Rawlins in a transaction similar to those involved in this case was affirmed by this court in Rose Fuel and Supply Co. v. Rawlins, 297 Ill. App. 389. The action there was in the form of replevin to recover coal which had been delivered to Dr. Rawlins in a transaction wherein Miss Julia Thon acted as the supposed agent of the vendor while she was in fact the agent of Dr. Rawlins. The Miss Julia Thon of that case is the Mrs. Julia Nankervis of this case.

4101c

MAGNOLIA FUEL COMPANY, an Illinois corporation,

Appellee,

v.

DR. C. A. MOSLER and PUBLIC [illegible],

Defendants.

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On Appeal of Dr. C. A. Mosler, [illegible]

Appellant.

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MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

In an action [illegible] and upon trial by jury, [illegible] of $2,916.67. In proceeding [illegible] defendant [illegible] the complaint which [illegible] found that [illegible] trial and in [illegible] defendant appeals.

It is urged that [illegible] defendant's motion [illegible] all the evidence [illegible] rulings on the [illegible] and in the [illegible] further, that [illegible] ant; and that there is [illegible]

[illegible]

those involved in this [illegible] Supply Co. v. [illegible] form of [illegible] resulting in a [illegible] agent of the [illegible] the [illegible] case.

The evidence tends to show that she played a similar part in these transactions.

Count II of the complaint under which the case was submitted to the jury alleged, and the evidence offered tended to show, that Rawlins is and for a number of years has been a practicing physician in Chicago and that he and Mrs. Julia Thon Nankervis have engaged in many transactions together with reference to purchases of coal; that Mrs. Nankervis occupied a place of confidence and trust with the Maryland Coal and Coke Company of Chicago and was well acquainted with the officers and agents of various retail coal dealers in the city; that plaintiff was one of such retail dealers with whom she dealt; that maliciously and with the intent to cheat plaintiff, she placed alleged orders of Rawlins with plaintiff for coal to be delivered for the account of Rawlins at the market prices of the kind and quality of coal ordered, thereby causing plaintiff to believe defendant would pay for the coal at the market price. At the same time, Rawlins and Julia Nankervis had a secret arrangement by which he was to pay her for the coal at a price far below the market price, thereby concealing their real intention to defraud plaintiff by securing delivery of the coal by plaintiff in the expectation it would be paid for at the market price, while their secret intention was to pay for it only at the lower price.

The evidence shows that Mrs. Nankervis told the agent of plaintiff that she believed she could secure for plaintiff the business of Dr. Rawlins which was considerable in amount; that plaintiff accepted her orders and on the day of receiving the same mailed to Dr. Rawlins an invoice for each load of coal delivered to him, this invoice showing the quality and kind of coal delivered and the price of it, which was in every instance much above the $6.50 per ton for which Mrs. Nankervis agreed with Rawlins that she would deliver it to him. The evidence shows that plaintiff knew nothing about the arrangement between Dr. Rawlins and Mrs. Nankervis and that defendant was at all times well aware of the price at which plaintiff was delivering the

The evidence tends to show that she played a similar part in these transactions.

Count II of the complaint under which the case was submitted to the jury alleged, and the evidence offered tended to show, that Hawline is and for a number of years has been a practicing physician in Chicago and that he and Mrs. Dunn formerly have engaged in many transactions together with reference to purchases of coal; that Mrs. Bankervis occupied a place of confidence and trust with the Maryland Coal and Coke Company of Chicago and was well acquainted with the officers and agents of various retail coal dealers in the city; that plaintiff was one of such retail dealers with whom she dealt; that maliciously and with the intent to cheat plaintiff, she induced alleged orders of Hawline with plaintiff for coal to be delivered for the account of Hawline at the market price of the kind and quality of coal ordered, thereby causing plaintiff to believe defendant would pay for the coal at the market price. At the same time, Hawline and Julia Bankervis had a secret arrangement by which he was to pay her for the coal at a price far below the market price, thereby concealing their real intention to defraud plaintiff by wrongfully delivery of the coal by plaintiff in the expectation it would be paid for at the market price, while their secret intention was to pay for it only at the lower price.

The evidence shows that [illegible] plaintiff that she believed the [illegible] of Dr. Hawline which was considerable [illegible] accepted her orders and on the [illegible] Hawline an invoice for each load of coal [illegible] voice showing the quality and the [illegible] it, which was in every instance [illegible] Mrs. Bankervis agreed with Hawline that [illegible] The evidence shows that plaintiff knew [illegible] between Dr. Hawline and Mrs. Bankervis and [illegible] times well aware of the price at which [illegible]

coal to him because he received invoices for all coal delivered showing the prices. The evidence shows that both Dr. Rawlins and Mrs. Nankervis were quite familiar with and knew the price of the coal which she ordered from plaintiff for defendant but that the order was given with a fraudulent intention to cheat plaintiff out of the difference between the price which Mrs. Nankervis had agreed should be charged for the coal and that for which the plaintiff rendered invoices. These transactions covered several months. Payment was made on account at different times and December 7, 1936, the books of plaintiff showed that defendant owed $3,218.37, the balance due for coal delivered by plaintiff to defendant at the prices named in the invoices.

Mr. Anderson of plaintiff company asked Dr. Rawlins to pay this balance. Rawlins refused saying he had paid plaintiff for all the coal he purchased and that Julia Nankervis had made the price of the coal $6.50 per ton. Mr. Anderson testified that when he called on Mrs. Nankervis at the office of the Maryland Coal and Coke Company, she said this was true and hung her head. This suit against both of them was then begun for fraud. Mrs. Nankervis was served with summons but did not answer. The first count charging conspiracy between her and Dr. Rawlins was dismissed at the close of all the evidence. She testified as a witness for Dr. Rawlins.

Defendant says that there is a total lack of proof of fraud and his motion for a directed verdict in his favor at the close of plaintiff's case should have been allowed for that reason. Defendant, however, did not stand on this motion but waived it by offering evidence in his own behalf. The real question, therefore, is whether the court erred in denying a similar motion which was made at the close of all the evidence. Popadowski v. Bergaman, 304 Ill. App. 422. Defendant has cited many cases stating the necessary elements of fraud and other cases holding that the burden of proof is on plaintiff not only to prove the fraud but to establish it by a clear preponderance of the evidence, and that there is in law a presumption that all transactions are fair and honest. There are many cases in the Supreme and Appellate courts of this state which so hold. Linington v.

coal to him because he received invoices for all coal delivered showing the prices. The evidence shows that both [illegible] and Mr. Manbervie were quite familiar with the price of the coal and [illegible] the ordered from plaintiff for defendant [illegible] with a fraudulent intention to cheat plaintiff [illegible] of the difference between the price which [illegible] should be charged for the coal and that for which the plaintiff [illegible] invoices. These transactions covered several months. [illegible] account at different times and however [illegible] showed that defendant owed [illegible] delivered by plaintiff to defendant [illegible] in the invoices.

[illegible] between of plaintiff [illegible] this balance. [illegible] the coal he purchased and [illegible] the price of the coal [illegible] per ton. [illegible] on are. Manbervie [illegible] the price of the coal [illegible] the said [illegible] them and then began for [illegible] quarrels but did not arrest. The [illegible] between Mr and [illegible] evidence. [illegible]

[illegible] fraud and his action [illegible] of plaintiff [illegible] but, however, [illegible] evidence in his own behalf. [illegible] the court erred in [illegible] close of all the evidence. [illegible] defendant [illegible] and other [illegible] only to move the [illegible] of the evidence, and that there is [illegible] transactions are [illegible] and Appellate courts of this state [illegible]

Strong, et al., 111 Ill. 152, 160; Foster v. Oberreich, 230 Ill. 525, 527; Carter v. Carter, 283 Ill. 324; Malewski v. Mackiewich, 282 Ill. App. 593, 601-2; Wright v. Peabody Coal Co., 290 Ill. App. 110, 115-16. Defendant, relying upon these cases, says the record is devoid of proof defendant made any representations at all to plaintiff and argues the evidence is insufficient for that reason. Defendant says he made no representation of fact in connection with these transactions and, therefore, as a matter of law the judgment cannot stand and the motion for a directed verdict in his favor at the close of all the evidence should have been given.

This argument disregards another well settled rule of law, namely, that a representation of fact is not necessarily made either by oral, written or printed words. Conduct may take the place of these and just as effectually become the means of perpetrating fraud. The books show that many frauds of the worst sort have been perfected in this way. Illustrative of these cases is Leonard v. Springer, 197 Ill. 532, 538, where the Supreme court, after quoting with approval from Bigelow on Fraud, said:

> "The most usual and obvious example is an oral, written or printed statement. But statement is by no means necessary. Any conduct capable of being turned into a statement of fact is a representation. There is no distinction between misrepresentations effected by words and misrepresentations effected by other acts."

The jury has found defendant to be guilty of fraud. We assume that to the jury and to the trial court the evidence was clear and convincing. The question before us is whether we can say as a matter of law there was no such clear evidence. To decide this point it becomes necessary to review the evidence.

While differing in many details the evidence is not, in what we regard as essentials, contradictory. Plaintiff is a retail dealer in coal. It purchased much of its coal from the Maryland Coal and Coke Company, a producer and distributor at wholesale. Julia Thon [now Mrs. Mankervis] was a clerk and stenographer for the Maryland company, where she became acquainted with Anderson, president of the plaintiff, in such a favorable way as to make the alleged fraud

of law

to

possible. She had been for many years well acquainted with defendant, Dr. Rawline, and had been a party to numerous deals in coal in which he was interested. She had been connected with the Belmont Coal Company whose office was at her home and later with the Belmont Fuel Company, from both of which coal had been purchased from other coal companies for Dr. Rawlins.

About April 15, 1934, she suggested to Mr. Anderson that she might be able to secure Rawline as a desirable customer, stating that he owned a large number of buildings [which he now denies]. Julia Thon in these transactions purported to be acting in the interests of plaintiff. The sequel showed that she was in fact acting in the interest of defendant and with his knowledge. The jury had a right to believe he knew this all the time and that both of them acted with a common design of cheating and defrauding plaintiff. Miss Thon took orders from Rawline for the delivery of coal and passed these orders on to plaintiff. Plaintiff at her request delivered the coal to defendant at seventeen different buildings. Upon each delivery there was mailed to defendant an invoice showing the date of purchase, the price per ton, the total amount, the quality, etc. Dr. Rawline never complained because this coal was billed to him rather than to Miss Thon. He never informed plaintiff of the now alleged agreement that his purchase was from Miss Thon and not plaintiff, or that he was to pay [not the price at which it was billed] but a much lower price on which he had agreed with her. After more than two years of this sort of dealing, plaintiff's president called defendant's attention to the fact that a large bill had accumulated which was unpaid. Defendant then, as in the Home Fuel case, denied his personal liability and denied that he had purchased the coal from plaintiff.He had used it but refused to pay for it. He repudiated any obligation to plaintiff and asserted that his deal was in fact an independent one with the supposed agent.

It may well be that he made no oral or printed representations, but his conduct for more than two years amounted to a repre-

possible. She had been for many years well acquainted with defendant, Dr. Hawline, and had been a party to numerous deals in coal in which he was interested. She had been connected with the Belmont Coal Company whose office was at her home and later with the Belmont Fuel Company, from both of which coal had been purchased from other coal companies for Dr. Hawline.

About April 15, 1926, she suggested to Dr. Hawline that she might be able to secure Hawline as a desirable customer, stating that he owned a large number of buildings [which he now denies]. While then in these transactions purported to be acting in the interests of plaintiff. The sequel showed that she was in fact acting in the interest of defendant and with his knowledge. The jury has a right to believe he knew this all the time and that both of them acted with a common design of obtaining and defrauding plaintiff. Also then took orders from Hawline for the delivery of coal and passed these orders on to plaintiff. Plaintiff at her request delivered the coal to defendant at seventeen different buildings. Upon each delivery there was mailed to defendant an invoice showing the date of purchase, the price per ton, the total amount, the quality, etc. Dr. Hawline never complained because this coal was billed to him rather than to Mrs. Thon. He never informed plaintiff of the day although asserts that his purchase was from Mrs. Thon and not plaintiff, in that he was to pay [not the price at which it was billed] but a much lower price on which he had agreed with her. After more than two years of business of dealing, plaintiff's president called [illegible] attention to the fact that a large bill had accumulated which was [illegible] then, as in the Iowa Fuel case, issued his [illegible] denied that he had purchased the coal from plaintiff. He [illegible] but refused to pay for it. He repeat[illegible] and asserted that his deal was in fact in [illegible] supposed agent.

It may well be that he made no [illegible] tations, but his conduct for more than two years [illegible]

sentation that he was the purchaser from plaintiff of the coal delivered to him and at the price named in the invoices he received. The artifice was essentially the same as that used in the Home Fuel & Supply Company case. The form of the action there was replevin but the basis of the action, as here, was found in continued conduct which amounted upon the part of defendant to fraudulent representations in that he was obtaining the coal of plaintiff without intending to pay for it and while intending to disclaim that he was in fact the real purchaser. In both cases the vendor became the victim of artifice and fraud through which it was deprived of its property.

We have not attempted to follow the evidence in detail nor discuss the supposed contradictions alleged and argued in the brief. The evidence we think shows the jury could reasonably find that the conduct of defendant amounted to fraud. That it was fraud we do not doubt. Defendant does not argue the form of the judgment was defective for want of finding malice was the gist of the action as in Ingalls v. Haklios, 373 Ill. 404. That point is not made.

It is urged the court erred in excluding evidence offered by defendant. In particular it is said the court erred in refusing to permit Anderson, president of plaintiff company, to be cross-examined as to transactions which plaintiff had with Julia Thon, the Belmont Coal Company and the Belmont Fuel Company prior to September 15, 1934. We have examined the rulings and hold these were within the discretion of the court on cross-examination. Moreover, all these matters were brought out fully in the course of the trial so that defendant was in no way injured by the ruling. Again, it is urged that the testimony of D. S. Willis of the Home Fuel & Supply Company as to dealings with Julia Thon in behalf of Dr. Rawlins with that company, were improperly admitted. However, since the action was for fraud and the intention of the parties in issue, we hold on the authority of many cases this evidence was properly admitted. Lockwood v. Doane, 107 Ill. 235; Fabian v. Traeger, 215 Ill. 220; Standard Mfg. Co. v. Brons, 118 Ill. App. 632-634; Diddes v. Page, 199 Ill. App. 47. It is objected the

contention that he was the purchaser from plaintiff of the coal delivered to him and of the price agreed to be included in the invoices he received. The article was essentially the same as that involved in the case of a supply company case. The form of the action then may depend but the basis of the action, as here, was [illegible] in continued conduct which amounted upon the part of defendant to [illegible] representations in that he was obtaining the coal on credit [illegible] intending to pay for it and with intending to [illegible] fact the real purchaser. In both cases the [illegible] of artifice and fraud through which it was obtained [illegible] property.

We have not attempted to [illegible] the evidence in detail nor discuss the supposed contradictions [illegible] in the record. The evidence we think shows the jury [illegible] conduct of defendant amounted to fraud. [illegible] no doubt. Defendant does not argue the form [illegible] defective for want of timely notice [illegible] Imperial v. Paulson, 170 Ill. 604. That point is not [illegible].

It is urged the court erred in excluding evidence offered by defendant. In particular it is [illegible] to permit Anderson, president of plaintiff company, to [illegible] as to transactions which plaintiff [illegible] coal company and the company that [illegible] we have examined the pleadings and find [illegible] of the court on cross-examination. [illegible] bringing out fully in his answers [illegible] no way injured by the ruling. [illegible] of [illegible] Ill. [illegible] Julia Ann in behalf of [illegible] admission. However, since the action [illegible] of the parties in issue, no harm [illegible] evidence was properly excluded. [illegible] Paulson v. Treasor, 41 Ill. 250; [illegible] App. 322-324; Hinden v. Case, 190 Ill. [illegible]

court admitted evidence as to ownership of the properties to which coal was delivered on the orders of defendant. We hold this evidence was admissible.

It is next urged the court erred in giving instructions. Complaint is made of plaintiff's instruction No. 1, which was: "The Court instructs the jury that in a civil action, like the one at bar, the party alleging fraud is not bound to prove its existence beyond a reasonable doubt. It will be sufficient if the fraud alleged in the declaration is established in the minds of the jury by the weight and preponderance of the evidence only. It is not necessary that the proof should be of such a character as would warrant the conviction of the defendant in a criminal prosecution for false and fraudulent representations." The instruction is similar to one held not erroneous by the Supreme court in McRoberts v. Combination Fountain Co., 317 Ill. 165. There the instruction was criticized as not limiting the jury to the fraud alleged in the declaration. Here that objection was eliminated. Complaint is made of plaintiff's given instruction No. 2, which was: "If you believe, from a preponderance of the evidence, under the instructions of the Court, that the defendant, O. A. Rawlins, acted knowingly, wilfully, fraudulently, maliciously, and deceitfully in causing such actual damage to the plaintiff, if any, then, in fixing the amount of the plaintiff's damages, if any, you are not confined to the actual damages shown by the evidence, if any, but may, in your discretion, award and include in your verdict as punitive or exemplary damages such further sum, if any, as in your judgment is right and proper in view of all the evidence and instructions of the Court." This instruction was apparently copied from the case of Laughlin v. Hopkinson, 292 Ill. 80. We think it subject to criticism, but it is apparent the jury did not allow punitive damages, and the error, if any, was therefore not reversible. Complaint is made of plaintiff's instruction No. 3, which was: "The court instructs the Jury that if you find for the plaintiff, its measure of damages is the fair and reasonable market value of the coal

court admitted evidence as to credibility of the witnesses to which you were delivered on the subject of witnesses. [illegible] admissible.

If it is next urged the court erred in giving instructions. complained in lieu of plaintiff's instruction No. [illegible] "The court instructs the jury that in arriving [illegible] bar, the party alleging fraud is not bound to [illegible] yond a reasonable doubt. It will be sufficient if the fraud alleged in the declaration is established in the minds of the jury to the weight and preponderance of the evidence only. [illegible] that the proof should be of such a character [illegible] vation of the defendant in a criminal prosecution. [illegible] irrelevant representations." The instruction [illegible] not erroneous by the Supreme Court in [illegible] v. Washington County, 37 Ill. 189. There the instruction [illegible] not limiting the jury to the fraud alleged in the declaration. [illegible] that objection was sustained. [illegible] instruction No. [illegible], which was: "If you believe from [illegible] of the evidence, under the instructions [illegible] and, [illegible], acted knowingly, willfully, fraudulently, maliciously, and deceitfully in making [illegible] tiff, if so, then, in fixing the amount of [illegible] if any, you are not confined to the amount [illegible] evidence, if any, but may, in your discretion [illegible] your verdict as punitive or exemplary [illegible] so, as in your judgment is right and [illegible] these instructions of the court. [illegible] copied from the case of [illegible] v. [illegible] is subject to criticism, but it is [illegible] punitive damages, and the error, if any, [illegible] complaint is made of plaintiff's instruction [illegible] court instructs the jury that if you find [illegible] measure of damages in the full and [illegible]

delivered by the plaintiff to the defendant, O. A. Rawlins less the payments made on account of the purchase of said coal." It is urged that there is no evidence tending to show what the fair, reasonable market value of the coal was. We think, however, the invoices showing the price charged, unobjected to by defendant, was sufficient evidence on this point. Moreover, Mr. Anderson testified in effect that the prices charged were reasonable. Complaint is made of plaintiff's modified instruction No. 1, which was: "Fraud may be proved by circumstantial evidence as well as positive proof. Where fraud is charged express proof is not required. It may be inferred from strong presumptive circumstances, and if the jury believe from a preponderance of the evidence that there are facts and circumstances, if any, they should and may be taken into consideration by the jury in determining whether the said O. A. Rawlins fraudulently intended to not pay plaintiff for the coal delivered." It is urged this instruction was erroneous in conveying to the jury the idea they could base their finding on conjecture or fancied possibility. We think the instruction was not erroneous. Strauss v. Kranert, 56 Ill. 234. While the instructions may not have been perfect, we do not think the verdict of the jury was because of any error of law stated in any of them.

It is argued the court erred in that special interrogatories were submitted to the jury without having been first submitted to counsel for defendant. The record indicates that these special interrogatories were prepared by the attorney for plaintiff and submitted to the trial judge. Whether attorney for defendants saw or did not see them does not affirmatively appear. Just before the argument to the jury began the attorney for defendant asked if the court wished to take up the instructions in advance, and the court replied "No." Attorney for plaintiff at the close of his argument told the jury he had asked to have the court submit a question as to whether malice was the gist of the action. He said he did not know whether the court would submit the question but went on to explain why under the evidence the question, if submitted, should be answered in the affirmative. So

delivered by the plaintiff to the defendant, C. O. Sewing Loss the payments made on account of the purchase of said coal." It is urged that there is no evidence tending to show what the fair, reasonable market value of the coal was. We think, however, the invoices showing the price charged, uncontested to by defendant, are sufficient evidence on this point. Moreover, Mr. Anderson testified in effect that the prices charged were reasonable. Complaint in case of plaintiff's modified instruction No. 1, which what "should not be proved by circumstantial evidence as well as positive proof." Here proof is charged express proof is not required. It may be inferred from strong presumptive circumstances, and if the jury believe from a preponderance of the evidence that there are facts and circumstances, if any, they should and may be taken into consideration by the jury in determining whether the said C. O. Sewing Irresponsibility intended to not pay plaintiff for the coal delivered." It is argued this instruction was erroneous in conveying to the jury the idea they could base their finding on conjecture or fanciful possibility. We think the instruction was not erroneous. Stewart v. Stewart, 86 Ill. 544. While the instructions may not have been perfect, we do not think the verdict of the jury was because of any error of law stated in any of them.

It is argued the court erred in that several interrogatories were submitted to the jury without having been first submitted to counsel for defendant. The record indicates that these several interrogatories were prepared by the attorney for plaintiff and submitted to the trial judge. Neither attorney for defendants - nor did not see them does not affirmatively appear. Just before the argument to the jury began the attorney for defendant asked if the court should take up the instructions in advance, and the court replied "No." Attorney for plaintiff at the close of his argument told the jury he had asked to have the court submit a question to the jury relating to the plat of the action. He said he did not know whether the court would submit the question but went on to explain his under the question, if submitted, should be answered in the affirmative.

far as the record shows defendant made no objection to this argument to the jury and did not complain at any time that the interrogatories had not been submitted to him for his inspection. Defendant cites Price v. Bailey, 265 Ill. App. 356-363, and other cases to the effect that under a former statute a direction that special interrogatories should be submitted to opposing counsel before the argument to the jury is mandatory. These cases construed §79 of the Practice Act of 1907, now §85, par. 189 of the Civil Practice Act. (Smith-Hurd Anno. Stats., ch. 110, pp. 558-59.) The interrogatories were submitted under this section apparently with section 155 of chap. 107 in mind, which in substance provides that no execution shall issue against the body of a defendant unless in a case where the judgment shall have been obtained for tort and there shall be a special finding by the court or jury that malice is the gist of the action. Of course, requests for such a special finding should be submitted to the opposing attorney as the statute provides. Counsel for plaintiff insists this was done and defendant denies. The abstract of record does not show this affirmatively but it does show affirmatively the interrogatories were argued to the jury by plaintiff and that at the close of the case the interrogatories were submitted to the jury without objection by defendant. Defendant so far as the record shows made no objection to the interrogatories on this or any other ground. Inadvertently, apparently, two interrogatories instead of one were given. ~~Plaintiff~~ was not thereby injured.

It is urged that the conduct of counsel for plaintiff and the conduct of the trial judge were prejudicial to defendant. We have given careful attention to these complaints and without saying there are no grounds for criticism, we hold that there is nothing in these respects which would constitute reversible error.

It is claimed there is no basis for the verdict in the evidence. The plaintiff's claim as stated in the complaint was for $3,218.37. The verdict of the jury was for $2,918.37. Apparently, the jury by mistake deducted a $300 check, payment of which was stopped by defendant. The mistake was against plaintiff. Defendant has no standing to complain of it. It is apparent that no punitive damages were allowed and the actual damages found are $300 less than should have been allowed. Substantial justice has been attained. The judgment will be affirmed.

JUDGMENT AFFIRMED.

O'Connor, P.J., and McSurely, J., concur.

far as the record shows defendant made no objection to this argument to the jury and did not complain at any time that the interrogatories had not been submitted to him for his inspection. Defendant cites *Erie v. Malley*, 236 Ill. App. 283-285, and other cases to the effect that under a former statute a direction that special interrogatories should be submitted to opposing counsel before the argument to the jury is mandatory. These cases construed §79 of the Practice Act of 1907, now §80, par. 159 of the Civil Practice Act. (Illinois [illegible], ch. 110, pp. 258-59.) The interrogatories were submitted under this section apparently with section 135 of chap. 1?7 in mind, which in substance provides that no execution shall issue against the body of a defendant unless in a case where the judgment shall have been obtained for tort and there shall be a special finding by the court or jury that malice is the gist of the action. Of course, requests for such a special finding should be submitted to the opposing attorney as the statute provides. Counsel for plaintiff insists this was done and defendant denies. The abstract of record does not show this affirmatively but it does show affirmatively the interrogatories were argued to the jury by plaintiff and that at the close of the case the interrogatories were submitted to the jury without objection by defendant. [illegible] so far as the record shows made no objection to the interrogatories on this or any other ground. Inadvertently, apparently, two interrogatories instead of one were given. Plaintiff was not thereby injured.

It is urged that the conduct of counsel for plaintiff and the conduct of the trial judge was prejudicial to defendant. We have given careful attention to these complaints and [illegible] there are no grounds for criticism, we hold that [illegible] in these respects which would constitute reversible error.

It is claimed there is no basis for [illegible] in the evidence. The plaintiff's [illegible] $7,???.00. The verdict of the jury was for $[illegible], [illegible] the jury by mistake deducted [illegible] items, [illegible] by defendant. The mistake was against plaintiff, [illegible] standing to complain of it. It is apparent [illegible] were allowed and the actual damages found [illegible] have been allowed. Substantial justice has been attained. The judgment will be affirmed.

AFFIRMED.

O'Connor, P.J., and McSurely, J., concur.

41016

| | | |
|---|---|---|
| RACINE FUEL COMPANY, an Illinois Corporation, Appellee, | ) | APPEAL FROM SUPERIOR COURT, COOK COUNTY. |
| v. | ) | |
| DR. O. A. RAWLINS and JULIA NANKERVIS, Defendants, | ) | |
| DR. O. A. RAWLINS, Appellant. | ) | |

306 I.A. 580

SUPPLEMENTARY OPINION UPON PETITION FOR REHEARING.

The petition says the court misapprehended the error argued with reference to special interrogatories. The language of the opinion has been modified in that respect. Section 65, paragraph 189 of the Civil Practice Act (Smith-Hurd Anno. Stats., chap. 110, p. 558) is the same as section 79 of the Practice Act of 1907 was. This section requires that requests to find specially upon any material question or questions of fact shall be stated to the jury in writing, "which questions of fact shall be submitted by the party requesting the same to the adverse party before the commencement of the argument to the jury." The section also provides in substance that submitting or refusing to submit a question of fact to the jury when requested "may be excepted to and be reviewed on appeal, as a ruling on a question of law." The cases hold the provision of the statute requiring such a question of fact be submitted to the adverse party is mandatory. P.C.C. & St. L. R. R. Co. v. Smith, 207 Ill. 486-490; Chicago City Ry. Co. v. Jordan, 215 Ill. 390-395; Price v. Bailey, 265 Ill. App. 358; Keys v. North, 271 Ill. App. 119. These cases are all distinguishable from this in that the question here seems to be narrowed down to whether the interrogatories were in fact submitted to the adverse party as required. In the cases cited it seems to have been conceded the special interrogatories were not so submitted. In this case the report of proceedings does not show any ruling by the trial judge on this question. If appellant desired to raise this question it was his duty

MACINE FUEL COMPANY, an Illinois Corporation,

Appellee,

v.

DR. C. A. MARLING and JULIA MARLINGVIE,

Defendants,

DR. C. A. MARLING,

Appellant.

306 IA. 380

SUPPLEMENTARY OPINION UPON A MOTION FOR REHEARING.

The petition says the court already considered the error alleged with reference to special interrogatories. The language of the opinion has been modified in that respect. Section 68, paragraph 149 of the Civil Practice Act (Ill. Ann. Stat., Ch. 110, § 68) is the same as section 73 of the Practice Act of 1907 was. This section requires that requests to find specially upon any material question or questions of fact shall be stated to the jury in writing, "which questions of fact shall be submitted by the court requesting the same to the adverse party before the commencement of the argument to the jury." The section also provides in substance that submitting or refusing to submit a question of fact to the jury [illegible] "may be excepted to and be reviewed on appeal, [illegible] law." The same holds the provision of the [illegible] question of fact be submitted to the adverse [illegible] [illegible] v. [illegible], 202 Ill. 498-[illegible]; [illegible] v. [illegible], 216 Ill. 380-[illegible]; [illegible] v. [illegible], 271 Ill. App. 1[illegible]. These cases are not [illegible] this in that the question here seems to [illegible] interrogatories were in fact submitted [illegible] quired. In the cases cited it seems [illegible] interrogatories were not so submitted. [illegible] proceedings does not show any ruling by the trial [illegible] question. If appellant desired to raise [illegible]

to obtain and preserve such a ruling. (Smith-Hurd Anno. Stats., §259.36; Supreme Court Rule 36.) This court cannot presume error. On the contrary, every presumption is in favor of the trial court and that the trial was carried on according to law. The report of proceedings shows the special interrogatories were argued by attorney for plaintiff and submitted by the court to the jury without objection on defendant's part nor were the same excepted to as provided by the statute, although the record shows defendant did except to the instructions as required by section 67 of the Civil Practice Act. The abstract indicates that this contention about the submission of interrogatories to defendant was urged for the first time in defendant's motion for a new trial and as No. 20 of 36 reasons given why the motion for a new trial should be granted. The motion for a new trial was denied by the court, indicating, we think, that in the opinion of the trial judge the interrogatories had been in fact submitted to the adverse party. It is apparent the point was thought of after the trial was over. Other points raised simply reargue points already decided.

Petition for rehearing is denied.

PETITION DENIED.

O'Connor, P.J., and McSurely, J., concur.

to obtain and preserve such a ruling. (Smith-Hurd Ann. Stat., 1959,56; Supreme Court Rule 16.) This court [illegible] error. On the contrary, every presumption is in favor of the trial court and that the trial was carried on according to law. The record of proceedings shows the special interrogatories were drawn by attorney for plaintiff and submitted by the court to the jury without objection on defendant's part nor were the same required to be written on the statute. Although the record shows defendant did request to the instructions as required by section 65 of the civil practice act. The abstract indicates that this contention cannot be considered of interrogatories to defendant was made for the first time in defendant's motion for a new trial and as do, 65 of 56 [illegible] given by the motion for a new trial should be granted. The motion for a new trial was denied by the court, indicating, in fact, that in the opinion of the trial judge the interrogatories had been in fact submitted to the adverse party. It is apparent the jury was thought of after the trial was over. Other points raised simply [illegible] [illegible] decided.

Petition for rehearing is denied.

[illegible]

O'Connor, J.J., and Schwartz, J., concur.

41057

GEORGE A. BOSOMBURG,
Appellant,

vs.

BIRK BROS. BREWING CO., a
Corporation,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

306 I.A. 580

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This cause has been here previously (298 Ill. App. 610) when a judgment for plaintiff for $50, entered on a verdict of the jury in the Municipal Court of Chicago, was reversed and the cause remanded, the court determining that plaintiff was entitled either to the full amount claimed or nothing whatever. The jury had apparently reached a compromise verdict. On the subsequent retrial of the case judgment was entered on a verdict for defendant and this appeal followed.

Plaintiff asserts that the verdict was contrary to the manifest weight of the evidence; that the court should have granted a new trial; that there was error in the admission of certain evidence and that he should have had judgment notwithstanding the verdict.

The statement of claim asserted that $300 was due plaintiff for legal services rendered In the Matter of Rockford Storage Warehouses, a corporation, bankrupt case No. 3016, Federal District Court for the Northern District of Illinois, western Division, and for $5 expenses incurred at defendant's request.

Defendant pleaded that it retained plaintiff to repossess certain property for the Rockford Brewing Company, paying $50 on account and agreeing to pay $250 more in the event of success. Additional work having become necessary, defendant agreed to pay and did pay $500 but knew nothing concerning the bankruptcy case and did not agree to pay $300 therefor. It further stated plaintiff had cashed defendant's check marked "Balance Paid in Full."

The uncontradicted evidence shows that in October, 1936, plaintiff was retained by defendant to replevin certain machinery in the possession of the Rockford Brewing Company, for which plaintiff

GEORGE A. BOCKSBERGER,
Appellant,

vs.

BIRK BROS. BREWING CO.,
Corporation,
Appellee.

APPEAL FROM
MULTNOMAH COUNTY
Honorable [illegible],
Judge.

MR. JUSTICE BEAUCHAMP DELIVERED THE OPINION OF THE COURT.

This cause has been heretofore [illegible] (Vol. [illegible], 210) wherein a judgment for plaintiff for $50, entered on a verdict of the jury in the Municipal Court of Portland, was reversed and the cause remanded, the court determining that plaintiff was entitled either to the full amount claimed or nothing, however. The jury had originally rendered a compromise verdict. On the subsequent trial of the case judgment was entered on a verdict for defendant and this appeal follows.

Plaintiff asserts that the verdict was contrary to the substantial weight of the evidence; that the court should have granted a new trial; that there was error in the admission of certain evidence and that he should have had judgment notwithstanding the verdict.

The statement of claim recounts that [illegible] the plaintiff for legal services rendered in the [illegible] of [illegible] Bocksberger-Jones, a corporation, bankrupt, case No. [illegible], [illegible] United States for the Northern District of Illinois, Western Division, [illegible] for $[illegible] expenses incurred at defendant's request.

Defendant pleaded that it [illegible]

certain property for the [illegible]

account and agreeing to [illegible]

ditional work having become necessary, [illegible]

did pay $800 but knew nothing concerning [illegible]

not agree to pay $[illegible] therefor. [illegible]

seeked defendant's check marked [illegible]

The uncontradicted evidence [illegible]

plaintiff was retained by defendant to [illegible]

the possession of the bankrupt having [illegible]

received $50 and was to get $250 more if he could get possession of the machinery. When it was subsequently ascertained that the brewery was in the hands of a receiver in bankruptcy the agreed fee was raised to $500. The bankruptcy court decided that defendant was entitled to the machinery as against the receiver of the brewing company and a statement was rendered for plaintiff's services. An attempt was then made by defendant to remove the machinery from the building belonging to the Rockford Storage Warehouse Company [also in bankruptcy] but the custodian of the building refused to permit removal until a court order was secured and a bond filed. Plaintiff secured such an order and had the bond filed. It is the fee for this latter service which is in dispute.

Plaintiff contended that a check for $125, endorsed by him, for "Balance in Full" should not have been admitted in evidence as the issue of accord and satisfaction was not in the case. While there is much to support this contention, we find it unnecessary to so decide. Plaintiff had rendered a statement for $805, showing a balance due of $430 and clearly including therein a claim for $305 for services and expenses in the Rockford Storage Warehouses, Inc. matter. There was no evidence of any dispute between the parties as to this statement at the time the check was endorsed "Balance in Full" and the statement attached to the check showed it was in full for the $500 item. Hence, there could be no accord and satisfaction for the $305 item. It is a fundamental principle that there can be no accord and satisfaction in the absence originally of a bona fide dispute as to the amount to be paid. Siegel v. Cohen, 210 Ill. App. 338; Woodbury v. U. S. Casualty Co., 284 Ill. 227; Economy Fuel Co. v. Standard Electric Co., 359 Ill. 504. That being the case, the evidence does not show an accord and satisfaction assuming that issue was involved in the case. Since the expense item was not denied, defendant, it would seem, should be held liable for that in any event.

The testimony of Hugo L. Getz in behalf of defendant, and in whose name the litigation for defendant was conducted, shows that after

received 150 and was to get [illegible] more if he could get [illegible] of the machinery. When it was subsequently ascertained that the property was in the hands of a receiver in bankruptcy by the time [illegible] raised to $800. The bankruptcy court decided that [illegible] was entitled to the machinery as against the receiver of the [illegible] company and a statement was received for [illegible]. An attempt was then made by defendant to remove the machinery from the building belonging to the bankrupt [illegible] [illegible] bankruptcy] but the cessation of the [illegible] removal until a court order was received and [illegible] secured such an order and [illegible] latter service which is in dispute.

Plaintiff contended that [illegible] for "Balance in full" should not [illegible] the issue of account and satisfaction [illegible] is much to support this contention, as [illegible] decide. Plaintiff had rendered a statement [illegible] balance due of $450 and clearly included [illegible] for service and expenses in the [illegible] matter. There was no evidence of [illegible] to this statement at the time [illegible] and the statement attended [illegible] $300 item. Hence, there [illegible] $300 item. It is a question [illegible] and satisfaction in the [illegible] to the account [illegible]

Goodenough v. [illegible], [illegible] Standard Plastic [illegible] does not show [illegible] volved in the case. [illegible] it would seem, should be [illegible]

The testimony of [illegible] whose name the litigation for [illegible]

he found the machinery could not be taken out of the building, he went to plaintiff's office on the instruction of defendant's vice-president to request his assistance which was given. This is not contradicted. Mr. Birk of defendant company admitted these services were not paid for. The only defense urged is that it was the intention of the parties that such services were within the terms of the original contract. Mr. Birk gave some evidence to the effect that this service was within the contemplation of the parties at the time that contract was made, but this, under all the circumstances, seems most improbable. Plaintiff testified that Birk in behalf of defendant expressly agreed to pay a reasonable fee for services to be rendered in the Rockford Warehouse Company matter. This is denied by Birk. Whether the promise was made or not, it seems unreasonable to suppose that it was the intention of the parties that this unusual and unexpected service should be rendered without compensation. We think the jury was misled by the check.

We hold that the verdict of the jury was against the manifest weight of the evidence and for this reason the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

O'Connor, P.J., and McBurney, J., concur.

be found the machinery could not be taken out of the building, he went to plaintiff's office on the instruction of defendant's vice-president to request his assistance which was given. This is not controverted. Mr. Birk of defendant company established these services and paid for. The only defense urged is that it was the intention of the parties that such services were within the terms of the original contract. Mr. Birk gave some evidence to the effect that this matter was within the contemplation of the parties at the time the contract was made, but this, under all the circumstances, seems very improbable. Plaintiff testifies that Birk in behalf of the court expressly agreed to pay a reasonable fee for services to be rendered in the Cooperland Warehouse Company matter. This is denied by Birk. Whether the promise was made or not, it seems unnecessarily to suppose that it was the intention of the parties that this unusual and unexpected service should be rendered without compensation. We think the jury was misled by the charge.

We hold that the verdict of the jury for neither the manifest weight of the evidence and for this reason the judgment will be reversed and the cause remanded.

O'Connor, P.J., and Kennedy, J., concur.

41121

SARAH J. MORAN,
Appellant,

v.

CHICAGO TITLE AND TRUST COMPANY, a Corporation, as Trustee under Trust Agreement 30465 and COCHRAN & McCLURE COMPANY, a Corporation,
Appellees.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

306 I.A. 581

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action in tort for personal injuries, upon trial by jury there was a verdict for defendant on which the court entered judgment, from which plaintiff appeals.

The action was based on an injury received by plaintiff, as she alleged, on September 20, 1936, while plaintiff, the guest of tenants of an apartment in a building demised by defendant, was entering a passenger elevator on the third floor of the building. Plaintiff alleged the elevator, which was of the automatic kind, was operated by the passenger. She averred and offered proof tending to show that the elevator was defective to such an extent that in the operation of it the platform of the elevator would stop much below the level of the floor when the button was pushed. Plaintiff argues that the manifest weight of the evidence was in her favor. The evidence is conflicting. The controlling question in the case is raised by plaintiff's point that the court erred in an instruction given to the jury at the request of defendants.

The instruction was as follows: "You are instructed that the defendant or defendants who you may find were maintaining the automatic elevator mentioned in the evidence were not insurers of the safety of persons using the elevator, and that it was the duty of the plaintiff, at and before the time of the occurrence complained of, to exercise for her own safety such care and caution as would be exercised by a reasonably prudent person, acting prudently, under the same or similar circumstances to those shown by the evidence; and, if

308 IA. 381

SARAH J. MORAN,

Appellant,

v.

CHICAGO TITLE AND TRUST COMPANY, a Corporation, as Trustee under Trust Agreement 30488 and CHICAGO & NORTH COMPANY, a Corporation,

Appellees.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT:

In an action in tort for personal injuries, upon trial by jury there was a verdict for defendant on which the court entered judgment, from which plaintiff appeals.

The action was based on an injury received by plaintiff, as she alleged, on September 20, 1938, while plaintiff, the guest of tenants of an apartment in a building operated by defendant, was entering a passenger elevator on the third floor of the building. Plaintiff alleged the elevator, which was of the automatic kind, was operated by the passenger. The evidence and offered proof tending to show that the elevator was defective in such an extent that in the operation of it the platform of the elevator came not even below the level of the floor when the button was pressed. Plaintiff argues that the manifest weight of the evidence was in her favor. The evidence is conflicting. The controlling question is [illegible] plaintiff's point that the court erred in so instructing the jury at the request of defendants.

The instruction was as follows: [illegible]

the defendant or defendants who you may find were maintaining the automatic elevator mentioned in the evidence, were not [illegible] safety of persons using the elevator, and that if [illegible] plaintiff, at and before the time of the injurious occurrence, [illegible] exercise for her own safety such care and caution as an ordinarily prudent person, acting prudently, [illegible] same or similar circumstances to those shown by the evidence, it

you find from the evidence that it was the duty of the plaintiff, before she stepped into the elevator, to look and ascertain where the floor of the elevator was, and that she failed to do so; And, if you find further that her failure to do so, if she did so fail, was negligence which caused or proximately contributed to cause the occurrence complained of, then the plaintiff cannot recover." Plaintiff says (and defendant denies) that this instruction directs a verdict. We think plaintiff's contention in this respect must be sustained. The instruction in substance tells the jury that if they find the facts to be as related in the instruction they shall return a verdict in favor of defendant, and this we understand to be an instruction which directs a verdict. In Smith v. Central Ry. Co., 142 Ill. App. 311, the opinion collects the cases and states the law to be:

"While it is the well settled law that the instructions of the court must be taken as a whole, as contended by appellee, and that the law applicable to different questions may be stated in separate instructions, and the law applicable to all questions involved need not be stated in each instruction given, in such case, the instructions supplement each other and where the law is fairly stated when viewed as a series they then fulfill the legal requirements. But where an instruction in effect directs a verdict, or by the ordinary interpretation of the language used it is susceptible of being understood by an ordinarily intelligent person as assuming the finding of a verdict by a jury for one of the parties, such an instruction must be regarded as directing a verdict. Pardridge v. Cutler, 168 Ill. 504; Montgomery Coal Co. v. Barringer, 218 Ill. 327; Terra Cotta Lumber Co. v. Hanley, 214 Ill. 243; Ill. Central R. R. Co. v. Smith, 208 Ill. 609; C. & A. R. R. Co. v. Kuckkuck, 197 Ill. 307."

Within the rule as thus stated, we hold the instruction complained of was one which directed a verdict.

Plaintiff in the trial court testified that she was eighty-one years of age; that she went to the premises in question where her son lived, and went up the elevator alone; that she started home about 8:00 or 8:30 P.M.; that her son was with her. They started out in the hall together, and when they came very near to the elevator there was a 'phone call for the son from his apartment. The son then said to his mother that he would be right out and would meet her in the lobby. Plaintiff then pushed open the outside door of the elevator, held it with her left hand, took hold of the other door with her right hand and pushed. She says she stepped into space and

you find from the evidence that it was [illegible] the plaintiff, before she stepped into the elevator, [illegible] floor of the elevator was, and that she [illegible] find further that the failure to do so, if [illegible] negligence which caused or [illegible] reason complained of; then the [illegible] safe (and defendant [illegible] verdict. [illegible] think plaintiff's [illegible] tained. The instruction [illegible] the facts to be as related [illegible] verdict in favor of [illegible] structed which directs a [illegible]

III. [illegible] III, the opinion [illegible]

While it is [illegible] the court must be taken as a [illegible] the law applicable to different [illegible] instructions, and the [illegible] not be stated in such [illegible] equipment such [illegible] as a matter that [illegible] instruction is [illegible] tation of the [illegible] an ordinarily intelligent [illegible] by a jury for one of [illegible] or otherwise [illegible] v. Bartmann, [illegible] [illegible] v. Lucknow, [illegible]

[illegible] the main on this [illegible] negligence if [illegible]

[illegible]

one years of [illegible] son lived, and [illegible] about 8:30 or [illegible] in the [illegible] this [illegible] the [illegible] elevator, [illegible] left her right hand and [illegible]

turned completely upside down. On cross-examination she said the elevator had a light in the top of it. She said she thought she stepped into space without looking. This instruction tells the jury that defendant was not an insurer of the safety of persons using the elevator. It is agreed this is a correct statement of law. The instruction further told the jury that it was the duty of plaintiff at and before the time of the occurrence to exercise for her own safety such care and caution as would be required of a reasonably prudent person under the same or similar circumstances. This also is conceded to be a correct statement of law. However, the instruction then passes from a general statement of what the law is to the consideration of facts peculiar to the case, and it undertakes to point out and define what plaintiff's duty was before she stepped into the elevator.

The instruction suggests that the jury might find from the omission to look and ascertain where the floor of the elevator was that this was negligence proximately causing the occurrence, and that if they so found she could not recover at all. On cross-examination plaintiff was asked whether she had looked to see whether the elevator was level with the floor. At first she said this could not be done under the circumstances. She said she would have to lean and look over the outside grating, and that she did not think she ever did that. The answer was stricken. She then said when she went into the elevator there were two doors. She opened the outside and then the inside one. With the doors opened she supposed she could see. She just stepped in. She may have looked on other occasions but she did not on this one. Plaintiff also admitted that when her deposition was taken she had said in reply to a question as to whether she looked, "No, I didn't look, I just stepped as usual." The suggestion of the instruction is absolutely to the effect that if she did not look, this was negligence which would bar her right to recover irrespective of any and all other facts and circumstances in the case. The instruction does not inform the jury that plaintiff in entering the elevator had a right to assume that those in charge of it had used reasonable care in order to

turned completely upside down. On cross-examination she said the elevator had a light in the top of it. She said she thought she stepped into space without looking. This instruction tells the jury that defendant was not an insurer of the safety of persons using the elevator. It is agreed this is a correct statement of law. The instruction further told the jury that it was the duty of plaintiff at and before the time of the occurrence to exercise for her own safety such care and caution as would be required of a reasonably prudent person under the same or similar circumstances. This also is conceded to be a correct statement of law. However, the instruction then asks from a general statement of what the law is to the consideration of facts peculiar to the case, and it undertakes to point out and define what plaintiff's duty was before she stepped into the elevator.

The instruction suggests that the jury might find from the omission to look and ascertain here the floor of the elevator was that this was negligence proximately causing the occurrence, and that if they so found she could not recover at all. On cross-examination plaintiff was asked whether she had looked to see whether the elevator was level with the floor. At first she said she could not be done under the circumstances. She said she would have to look over the outside something, and that she did not [illegible] that. The answer was stricken. The trial [illegible] into the elevator there were two doors. She opened the outside [illegible] with the door opposite the opposite [illegible] the way here looked on other occasions [illegible] plaintiff also admitted that when [illegible] and said in reply to a question as to [illegible] look, I just stepped as usual. [illegible] absolutely to the effect that [illegible] which would bar her right to recover [illegible] facts and circumstances in the case. The instruction was not [illegible] the jury that plaintiff in entering the elevator was [illegible] assume that there in charge of it had used reasonable care in order to

see that it was in proper condition to perform its functions, and without such information as to the law applicable it was not improbable that the jury would be led astray. In Moohr v. Victoria Inv. Co., 144 Wash. 387, the court quotes with approval from Tousey v. Roberts, 114 N.Y. 312, 316:

"An elevator for the carriage of persons is not, like a railroad crossing at a highway, supposed to be a place of danger, to be approached with great caution; but, on the contrary, it may be assumed, when the door is thrown open by an attendant, to be a place which may be safely entered without stopping to look, listen or make a special examination."

In Fraser v. Harper House Co., 141 Ill. App. 393, it was held the proprietor of a passenger elevator was to be held to the same degree of care for the safety of guests as a railroad is required to use for the safety of its passengers. In that opinion the court said:

"It cannot be imputed to a passenger as negligence that he assumes while riding an attitude to which the construction of the car invites or tempts him."

In Chicago Exchange Building Co. v. Nelson, 197 Ill. 337, the Supreme court said:

"When the door was thrown open in such a way as to invite the passengers to alight, it was not appellee's duty to stop, listen or make an examination before departing from the elevator. He had a right to assume that the appellant would perform its full duty toward him."

The rule rests upon a familiar principle of the law, namely, that a person has a right to assume those in charge of instrumentalities of this kind will use the highest degree of care compatible with the operation of the instrumentality to see that it is fitted to perform its function. Upon the same principle it was held in Pollard v. Broadway Cent. Hotel Corp., 353 Ill. 312, that the proprietor of a hotel who invited the public to come and for a gainful purpose, had no right to permit the existence of dangerous and unguarded offsets or steps, so that the slightest mistake on the part of a guest would result in injury to him. The court said:

"The law does not charge one with anticipating dangers and negligent conditions, but he may assume that others have done their duty to give proper warning of hidden dangers."

In Puck v. City of Chicago, 281 Ill. App. 6, this court has

applied the same principle to a plaintiff accidently injured while walking upon the public streets. We there said:

"Long ago our Supreme Court held that a pedestrian upon a sidewalk may ordinarily assume that it is in a reasonably safe condition for travel, and is not absolutely bound to keep his eyes constantly fixed on the sidewalk in search of possible holes or other defects. City of Chicago v. Babcock, 143 Ill. 358; Graham v. City of Chicago, 260 Ill. App. 590."

This rule, we think, is particularly applicable to those maintaining for the use of tenants and their guests an automatic elevator, the slightest defects in which render it dangerous to persons invited to use it.

Defendant says that the instruction after all puts all these questions up to the jury, and in a way that is true. The jurors are not usually accustomed to make a careful analysis of sentences, and this instruction is of a kind well designed to mislead. Under all the circumstances in this case the instruction amounted practically to a direction to return a verdict for the defendant, which the jury did. There were issues of fact in the case which should have been tired by the jury under proper instructions. For the error in giving this instruction the judgment will be reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

O'Connor, P.J., and McSurely, J., concur.

applied the same principle to a plaintiff accidentally injured while walking upon the public streets. As there said:

"Long ago our Supreme Court held that a pedestrian upon a sidewalk may ordinarily assume that it is in a reasonably safe condition for travel, and is not absolutely bound to keep his eyes constantly fixed on the sidewalk in search of possible holes or other defects. City of Chicago v. Babcock, 168 Ill. 339; Hayes v. City of Chicago, 250 Ill. App. 590."

This rule, we think, is particularly applicable to those maintaining for the use of tenants and their guests an automatic elevator, the slightest defects in which render it dangerous to persons invited to use it.

Defendant says that the instruction after all puts all these questions up to the jury, and in a way that is true. The jurors are not usually accustomed to make a careful analysis of evidences, and this instruction is of a kind well designed to mislead. Under all the circumstances in this case the instruction amounted practically to a direction to return a verdict for the defendant, which the jury did. There were issues of fact in the case which should have been tried by the jury under proper instructions. For the error in giving this instruction the judgment will be reversed and the cause remanded for another trial.

Reversed and remanded.

O'Connor, P.J., and McSurely, J., concur.

41132

ARCHIE L. BREECE,
Appellee,

v.

GUY A. RICHARDSON and WALTER J. CUMMINGS,
as Receivers, etc., et al., doing business
as CHICAGO SURFACE LINES,
Appellants.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

306 I.A. 582

MR. JUSTICE HATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment in tort for $1225 entered on the verdict of a jury. It is urged for reversal that plaintiff failed to establish a prima facie case; that the verdict is against the manifest weight of the evidence, and that the court erred in instructions given and refused.

The left leg of plaintiff was broken at the knee on November 8, 1937, in an accident at the intersection of Lincoln and Winnemac avenues in Chicago, when he was getting on or riding on one of defendant's street cars. Lincoln avenue extends northwest and southeast; Winnemac avenue east and west. The complaint charged defendant was negligent in failing to cause the street car to stop a sufficient time to give plaintiff a reasonable opportunity to get on the car, and negligent in moving the car with a sudden, severe, violent and unusual jerk. The answer denied defendant was negligent in any of these respects and denied plaintiff was in the exercise of due care.

We hold the evidence was sufficient to make a prima facie case requiring its submission to the jury. Kavale v. Morton Salt Co., 242 Ill. App. 205, 213.

The evidence tended to show that on the morning in question plaintiff was on his way to his office down town; that he carried in his hand a newspaper and a container about nine by twelve inches in dimensions; that he went from his home to the intersection for the purpose of becoming a passenger on defendant's street car; that rain was falling and while waiting for the street car plaintiff, with

ALICE

ARONIX L. BRESSE,

Appellee,

v.

GUY A. RICHARDSON and WALTER J. DEWINNE, as Receivers, etc., et al., doing business as CHICAGO SURFACE LINES,

Appellees.

APPEAL FROM
CIRCUIT COURT,
Cook County.

306 I.A. 382

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment in tort for $1250 entered on the verdict of a jury. It is urged for reversal that plaintiff failed to establish a prima facie case; that the verdict is against the manifest weight of the evidence, and that the court erred in instructions given and refused.

The left leg of plaintiff was broken at the knee on November 8, 1927, in an accident at the intersection of Lincoln and Kimball avenues in Chicago, when he was getting on or riding on one of defendant's street cars. Lincoln avenue extends northwest and southeast; Kimball avenue east and west. The principal charge defendant was negligent in failing to cause the street car to stop a sufficient time to give plaintiff a reasonable opportunity to get on the car, and negligent in moving the car when a motion, course, right of way ensued. The answer denied defendant was negligent in any of these respects and denied plaintiff was in the exercise of due care.

We hold the evidence was sufficient to make a prima facie case requiring its submission to the jury. Lewis v. Cotton, 241 Ill. App. 506, 513.

The evidence tended to show that on the morning of accident plaintiff was on his way to his office down town; that he carried in his hand a newspaper and a container about one in height, large in diameter; that he went from his home to the intersection, the purpose of boarding a passenger on defendant's street car; that rain was falling and while waiting for the street car plaintiff, with

several other persons, took shelter in a doorway at the northwest corner of the intersection; that defendant's car arrived at its usual time, which was about 8:08 A.M., and stopped at the place where it was accustomed to stop; that plaintiff with others who had waited crossed to the car; that all the other people got on the car; that a large truck, also bound south, stopped a few feet back of the street car; that plaintiff was closely following the passenger immediately in front of him and was about to board the car when it started up; that the truck started up at the same time; that plaintiff, confronted with this situation, jumped about a foot or a foot and a half toward the moving car; that he got hold of the grab handle of the car with his right hand and hit the step with his right foot simultaneously. When the car had carried him a little distance he "hollered." The conductor rang the stop bell. The car was stopped about 25 or 35 feet from where it started. Plaintiff says his right foot was solidly on the step but at no time did he get either foot on the platform. However, as the car came to a stop he pulled himself on to the platform. He was not unconscious at any time. He paid fare to the conductor and went into the body of the car. He hobbled or hopped on one foot into the inside of the car and took part in a conversation in which the conductor asked the names of witnesses. He wrote his own name, address etc. on a card and gave it to the conductor. He did not at this time feel pain. He told the conductor he thought his leg was broken. In 1935, the patella of the same left leg had been fractured, and he had thereafter been somewhat careful of it. The conductor asked him if he wished to go to a hospital; plaintiff said he did not. Plaintiff rode down town on this same car, got off at State and Polk streets. The conductor helped him off, called a cab and held the car while plaintiff got off the car and into the cab. Plaintiff then went to his office, and later in the day became dizzy and was taken to the Presbyterian Hospital, where his left leg was found to have been broken.

Plaintiff is not able to tell just how the breaking of his

several other persons, took shelter in a doorway at the northeast corner of the intersection; that defendant's car arrived at the usual time, which was about 5:00 A.M., and stopped at the place where it was accustomed to stop; that plaintiff with others who had waited crossed to the car; that all the other people got on the car; that a large truck, also bound south, stop on a few feet back of the street car; that plaintiff was closely following the passenger immediately in front of him and was about to board the car when it started up; that the truck started up at the same time; that plaintiff, confronted with this situation, jumped about [illegible] feet or a foot and a half toward the moving car; that he got hold of the grab handle of the car with his right hand and hit the step with his right foot simultaneously. When the car had carried him a little distance, he believes, the conductor rang the stop bell. The car was stopped about 20 or 30 feet from where it started. Plaintiff says his right foot was solidly on the step but at no time did he get either feet on the platform. However, as the car came to a stop he [illegible] on the platform. He was not unconscious at any time. [illegible] to the motor so he went into the body of the car. [illegible] and took part in the inside of the car and took part in a conversation in which the conductor asked the name of witnesses. [illegible] his own name, address etc. on a card and gave it to the conductor. [illegible] feel pain. He told the conductor he thought his leg was crushed. In 1935, the details of the same [illegible] thereafter been somewhat careful of it. The conductor asked if he wished to go to a hospital; plaintiff said no [illegible] down town on this same car, got off at [illegible] conductor helped him off, called a [illegible] got off the car and into the cab. Plaintiff [illegible] and later in the day became [illegible] hospital, where his left leg was found to have been broken.

Plaintiff is not able to tell just how [illegible]

leg occurred. He testified that the car moved with a "jerk" but gives no further description of the movement. He did not feel pain when the leg was broken. The motorman, conductor and two passengers say they did not observe any jerk after the car moved.

Defendant argues that the evidence being thus there was a failure to prove the particular negligence and cause of injury as alleged in the complaint, and citing Buckley v. Mandel Brothers, 333 Ill. 370-371; Miller v. Chicago & Northwestern Railway Co., 347 Ill. 487, 493, and many similar cases argues that plaintiff, therefore, did not make out a prima facie case. Defendant says the premature starting of the street car could not have been the proximate cause of plaintiff's injury because the complaint alleged, and plaintiff testified, he landed safely on the step when he jumped and that the "jerk" could not have been the cause of the injury because the preponderance of the evidence is to the effect that no "jerk" of the kind alleged in the complaint occurred. Therefrom the conclusion is drawn that there was no proof of negligence proximately causing the injury as alleged in the complaint.

The argument is ingenious but cannot prevail. The complaint alleges two negligent and concurring acts contributing to the injury of plaintiff. The failure to prove one of them by a preponderance of the evidence does not compel holding as a matter of law that defendant was not guilty. Weber Wagon Co. v. Kehl, 139 Ill. 644; Kovell v. North Roseland Motor Sales, 275 Ill. App. 566. Both these alleged acts, the evidence tended to show, were a part of the occurrence on which plaintiff's suit is based.

Under the Civil Practice Act the basis of a suit is regarded as the "transaction or occurrence" set up in the complaint rather than any one particular act alleged in it. (Smith-Hurd Anno. Stats. ch. 110, par. 170, §46.)

It is next argued plaintiff failed to prove he was in the

leg occurred. He testified that the car moved with a "jerk" but gave no further description of the movement. He did not feel pain when the leg was broken. The motorman, conductor and two passengers say they did not observe any jerk after the car moved.

Defendant argues that the evidence being thus there was a failure to prove the particular negligence and cause of injury as alleged in the complaint, and citing Buckley v. Kansas Southern, 225 Ill. 370-371; Miller v. Chicago & Northwestern Railway Co., 247 Ill. 497, 492, and many similar cases argues that plaintiff, therefore, did not make out a prima facie case. Defendant says the premature starting of the street car could not have been the proximate cause of plaintiff's injury because the complaint alleged, and plaintiff testified, he landed safely on the step when he jumped and that the "jerk" could not have been the cause of the injury because the preponderance of the evidence is to the effect that no "jerk" of the kind alleged in the complaint occurred. Therefore the conclusion is drawn that there was no proof of negligence proximately causing the injury as alleged in the complaint.

The argument is ingenious but cannot prevail. The complaint alleges two negligent and concurring acts contributing to the injury of plaintiff. The failure to prove one of them by a preponderance of the evidence does not cause holding as a matter of law that defendant was not guilty. Baker Ice Co. v. Kahn, 198 Ill. 566; Kowall v. North Chicago Motor Lines, 276 Ill. 4[illegible], 4[illegible]. With these alleged acts, the evidence tended to show, were a part of the occurrence on which plaintiff's suit is based.

Under the Civil Practice Act the basis of a suit is described as the "transaction or occurrence" set up in the complaint rather than any one particular act alleged in it. (Smith- and Cohn. Ill. Ch. 110, par. 170, §46.)

It is next argued plaintiff failed to prove he was in the

exercise of due care at the time he received his injury. Defendant calls attention to §81 of the Uniform Traffic Code of Chicago, which provides: "It shall be unlawful for any person to board or alight from a street car or vehicle while said street car or vehicle is in motion." It is said this section is before this court on review by reason of the Judicial Notice Act (Ill. Rev. Stats. 1937, §§48a and 48b); that it is not necessary to state such ordinances or statutes in the pleadings (People, ex rel. Krajci v. Kelly, 279 Ill. App. 22), and that an ordinance when passed pursuant to power conferred by statute has the force and effect of a statute. U.S. Brewing Co. v. Stoltenberg, 211 Ill. 531, 537. Plaintiff, it is pointed out, admits that he jumped on a moving car. Defendant says this violated the ordinance and constituted negligence per se and insists that the motion for judgment in defendant's favor should have been granted for this reason. In Little v. Peoria Railway Co., 215 Ill. App. 385, 388, the court said:

> "It is the settled law of this State that it is not negligence per se for a person to get upon a street car when it is in motion, and that the question whether, under the particular circumstances of the case, the act of the person so getting upon a street car in motion is negligence in fact, contributing to the resulting injury, is for the jury. Cicero & P. St. Ry. Co. v. Meixner, 160 Ill. 320; North Chicago St. Ry. Co. v. Wiswell, 188 Ill. 613; South Chicago City Ry. Co. v. Dufresne, 200 Ill. 456; Chicago Union Traction Co. v. Lundahl, 215 Ill. 289; Kelly v. Chicago City Ry. Co., 283 Ill. 640."

Defendant's instruction No. 9, given at its request, was based on this rule of law. After calling the attention of the jury to §81 of the Uniform Traffic Code the instruction concluded; "If you believe from the evidence that the plaintiff attempted to board said street car while it was in motion and that in doing so he was guilty of negligence which proximately contributed to his injury, if any, you should find the defendants not guilty." The plaintiff's argument evidence here is to the effect that the mere act of getting on the car, while it created the condition which made possible the injury to plaintiff's limb, was not the proximate cause of it. At any rate, as we have seen, defendant caused this question to be submitted to the jury upon this theory, and the jury returned a verdict against it and for plaintiff.

exercise of due care at the time he received his injury. Defendant calls attention to §81 of the Uniform Traffic Code of Chicago, which provides: "It shall be unlawful for any person to cross or climb from a street car or vehicle while said street car or vehicle is in motion." It is said this section is before this court on review by reason of the judicial notice act (Ill. Rev. Stat. 1947, Chap. 1006 48b); that it is not necessary to state such ordinance or statutes in the pleadings (Chicago, R. I. & P. R. R. v. Bailey, 177 Ill. App. 464), and that an ordinance when passed pursuant to legal conferred by statute has the force and effect of a statute. Chicago Rys. Co. v. Stallenberg, 211 Ill. 271, 287. Similarly, it is pointed out, which that be jumped on a moving car. Although any one this violation the ordinance and constituted negligence per se and insists that the motion for judgment in defendant's favor should have been granted for this reason. In Little v. Chicago Railway Co., 318 Ill. App. 488, 492, the court said:

"It is the settled law of this State that it is not negligence per se for a person to get upon a street car while it is in motion, and that the question whether, under the circumstances of the absence of the car, the act of the passenger getting upon a street car in motion is negligence in fact, constituting to the contributing injury, is for the jury. Chicago [illegible] v. [illegible], 182 Ill. App. 380; North Chicago [illegible] v. [illegible], 197 Ill. 216; [illegible] City [illegible] v. Duffendale, 90 Ill. App. [illegible]; [illegible] v. Lundahl, 219 Ill. 290; Kelly v. [illegible], 242 Ill. App. 240."

Defendant's instruction [illegible] based on this rule of law. After calling the attention of the jury to §81 of the Uniform Traffic Code the instruction concluded: "If you believe from the evidence that the [illegible] to board and direct car while it was in motion and that [illegible] of negligence which proximately [illegible] injury, [illegible] should find the defendant not guilty." The instruction [illegible] evidence is to the effect that the mere act of getting on the car, while it stopped the condition which made possible the injury [illegible] link, was not the proximate cause of it. [illegible] defendant caused this question to be submitted [illegible] theory, and the jury returned a verdict [illegible].

In its motion for judgment notwithstanding the verdict defendant does not urge the violation of the ordinance as a reason for granting the motion. The mere fact that conduct is unlawful does not make it negligent. Russell v. Richardson, 302 Ill. App. 589; LeMette v. Director General of Railroads, 306 Ill. 348.

Defendant says the judgment should be reversed because of error in the court's ruling on instructions. Defendant submitted twenty-seven instructions (too many) of which seventeen were given. Complaint is made of instruction No. 3, by which the jury was told it was the duty of defendant to keep the street car stopped a reasonable length of time so as to permit plaintiff, in the exercise of reasonable care, to board the car safely. Defendant again says the theory of plaintiff was not that he was injured by the starting of the car but because of a sudden, severe jerk which threw him, and defendant cites Buckley v. Mandel Bros., 333 Ill. 370-371, to the point that plaintiff could not recover on a ground other than that stated in the complaint. It also cites Lyons v. Ayerson & Son, 242 Ill. 409, 415, and other cases to the effect that it is error in an instruction to direct the attention of the jury to an element of liability not shown by the pleadings or the evidence. We have already called attention to defendant's attempt to separate two concurrent negligent acts. Plaintiff, it will be remembered, testified that the time between these acts was "a split second." We hold this instruction stated the law applicable. Garlinski v. Chicago City Ry. Co., 257 Ill. App. 414; Klinck v. Chicago Railway, 262 Ill. 280.

Complaint is also made that the court refused to give defendant's requested instruction No. 19, which would have told the jury if plaintiff did not reach the place used by passengers for boarding the car before the car started he was not a passenger. The law this instruction evidently was intended to state was covered by defendant's given instruction No. 16-1/2.

Complaint is made of plaintiff's given instruction No. 8, by which the jury was told in substance that if defendant stopped its

in its motion for judgment notwithstanding the verdict defendant does not urge the violation of the ordinance as a reason for granting the motion. The mere fact that conduct is unlawful does not make it negligence. Russell v. Richardson, 305 Ill. App. 288; Lessing v. Director General of Railroads, 306 Ill. 348.

Defendant says the judgment should be reversed because of error in the court's ruling on instructions. Defendant submitted twenty-seven instructions (too many) of which seventeen were given. Complaint is made of instruction 10, by which the jury was told it was the duty of defendant to keep the street car stopped a reasonable length of time so as to permit plaintiff, in the exercise of reasonable care, to board the car safely. Defendant again says the theory of plaintiff was not that he was injured by the starting of the car but because of a sudden, severe jerk which threw him, and defendant cites Buckley v. Kandel Bros., 232 Ill. 370-371, to the point that plaintiff could not recover on a ground other than that stated in the complaint. It also cites Lyons v. Jackson, 242 Ill. 404, 412, and other cases to the effect that it is error in an instruction to direct the attention of the jury to an element of liability not shown by the pleadings or the evidence. We have already called attention to defendant's attempt to separate two concurrent negligent acts. Plaintiff, it will be remembered, testified that the time between these "was a split second." A bold line instruction stated the law applicable.

Gallisati v. Chicago City Ry. Co., 187 Ill. App. 464; Kinney v. Chicago Railway, 268 Ill. 422.

Complaint is also made that the court refused to give defendant's requested instruction no. 1, which would have told the jury if plaintiff did not reach the place used by passengers for getting on the car before the car started he was not a passenger. The law which instruction evidently was intended to state was covered by defendant's given instruction no. 14-1/2.

Complaint is made of plaintiff's given instruction no. 9, by which the jury was told in substance that if defendant failed to

car at the place where its cars usually and customarily stopped for the purpose of receiving and discharging passengers, it thereby by implication invited persons in a position to and intending to take passage thereon to board the car, and the act of any such person to board the car was an acceptance of the invitation and created the relation of passenger and carrier; that if the jury believed plaintiff was in the position and intended to take passage on the car, the relationship of carrier and passenger existed. The evidence was undisputed that the car stopped to take on passengers at the usual place. The instruction was not erroneous and we find no reversible error in other instructions.

It is also urged that the verdict of the jury was clearly and manifestly against the weight of the evidence and that a new trial should have been given for that reason. It is true the largernumber of witnesses testified there was no unusual jerk of the car after it started up. Nevertheless, the uncontradicted fact in the case (entitled to much weight) is that plaintiff's leg was broken during this occurrence. That did not take place without cause. There is no claim the damages are excessive. The jury seems to have taken a dispassionate view of the situation, and we are reluctant to say we know more about the facts of the case then the twelve who tried and the trial judge who approved their verdict. The judgment will, therefore, be affirmed.

JUDGMENT AFFIRMED.

O'Connor, P.J., and McSurely, J., concur.

car at the place where its cars usually and customarily stopped for the purpose of receiving and discharging passengers. It thereby by implication invited persons in a position to and intending to take passage thereon to board the car, and the act of any such person to board the car was an acceptance of the invitation and created the relation of passenger and carrier; that if the jury believed plaintiff was in the position and intended to take passage on the car, the relationship of carrier and passenger existed. The evidence was undisputed that the car stopped to take on passengers at the usual place. The instruction was not erroneous and we find no reversible error in other instructions.

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JUDGMENT AFFIRMED.

O'Connor, P.J., and McNally, J., concur.

41149

CHARLES G. FRANK, as Trustee, etc.,
Appellant,

v.

JAMES M. NEWBURGER, et al., and
WALTER A. SALOMON, et al.,
Appellees.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

306 I.A. 582

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This cause was before this court on a former appeal. (Frank v. Newburger, 298 Ill. App. 548.) There the defendants, Salomon and others, appealed from an order entered denying a motion purporting to be made in conformity with §72 of the Civil Practice act to vacate a decree of foreclosure entered November 13, 1936, and subsequent orders. A majority of this court were of the opinion that §72 was applicable to a proceeding in chancery and reversed the order which denied the motion with directions. The writer of this opinion while agreeing that the decree was erroneous dissented for the reason, as stated in a dissenting opinion filed, that the action was in chancery and a motion under §72 of the Civil Practice act was therefore not applicable. The order denying the motion was reversed with directions in conformity with the view of a majority of the court.

Plaintiff then filed a petition for leave to appeal to the Supreme court and April 4, 1939, the Supreme court entered an order that this petition should be dismissed "for want of final judgment." The mandates from this court and the Supreme court having been filed in the trial court, the cause was reinstated in that court on October 20, 1939, and in conformity with the mandates the trial court entered an order vacating and setting aside the final decree of foreclosure and granting leave to defendants to plead or answer the bill of complaint. From this order defendant now has brought a further appeal to this court.

Defendant moves to dismiss the appeal on the ground that the Supreme court has held that the order appealed from is not final.

CHARLES O. FRANK, as Trustee, etc.,
Appellant,

v.

JAMES H. ARMSTRONG, et al., and
WALTER A. SALONEN, etal.,
Respondents.

306 P.A. 389

NO. 30 TICK MARKET DELIVERED FOR FILING [illegible]

This cause was before this court on a former appeal. (Frank v. Armstrong, 200 Wn. App. 888.) There the plaintiff, Salonen and others, appealed from an order entered granting a motion approving to be made in conformity with [illegible] of the [illegible] not to vacate a decree of foreclosure entered [illegible], and judgment order. A majority of this court were of the opinion that [illegible] applicable to a proceeding in chancery and reversed the order denied the motion with directions. The writer of this opinion agreeing that the decree was erroneous dissented for the reason, stated in a dissenting opinion filed, that the motion was in substance and a motion under [illegible] of the [illegible] was therefore not [illegible]. The order denying the motion was reversed with directions in conformity with the view of a majority of the court.

Plaintiff then filed a petition for leave [illegible] to the supreme court and April 6, 1939, the [illegible] an order that this petition should be dismissed [illegible] judgment.) The mandate from this court and the [illegible] in the trial court, the cause [illegible] 20, 1939, and in conformity with [illegible] an order vacating and setting aside the [illegible] and granting leave to defendants to [illegible] plaint. From this order defendants [illegible] to this court.

Defendant moves to dismiss the [illegible] the Supreme court has held that the order [illegible]

The law as announced by the Supreme court is binding upon this court. The Supreme court has held that the order appealed from is not final and appealable. That order is also in conformity with the former decision of this court. Manifestly, we cannot entertain an appeal from an order which the Su reme court has held to be not final and one which was also entered in conformity with the directions of our own court. The appeal will therefore be dismissed.

APPEAL DISMISSED.

O'Connor, P.J., and McSurely, J., concur.

The law as announced by the Supreme court is binding upon this court. The Supreme court has held that the court appealed from is not final and appealable. That order is also in conformity with the former decision of this court. Manifestly, we cannot entertain an appeal from an order which the Supreme court has held to be not final and one which was entered in conformity with the directions of our own court. The appeal will therefore be dismissed.

AFFIRMED. (FULL BD.

O'Connor, P.J., and Doherty, J., concur.

9560

306 Ill. App. Adv. pg. 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 7th day of May, in the year of our Lord one thousand nine hundred and forty, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice
Hon. BLAINE HUFFMAN, Justice
Hon. FRANKLIN R. DOVE, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WEITER, Sheriff

306 I.A. 607

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BE IT REMEMBERED, that afterwards, to-wit: On SEP [illegible] the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

GEN. NO. 9560 AGENDA NO. 14

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

May Term, A.D. 1940

| | | |
|---|---|---|
| LOIS MADISON, Appellee | ) | APPEAL FROM THE |
| vs. | ) | CIRCUIT COURT OF |
| JACK ESSINGTON, Appellant | ) | LA SALLE COUNTY |

DOVE, J.

On the evening of July 15, 1938, Jack Essington, accompanied by Lois Madison and Robert Green, drove his father's five-passenger Dodge Sedan from Streator to Pontiac to attend a dance. About eleven o'clock that evening they started on their return trip from Pontiac to Streator. Jack Essington was driving the car and Lois Madison and Robert Green were seated in the rear seat. As they proceeded along State Route 23 and at a point about eight miles north of Pontiac, the right rear wheel of the automobile in which they were riding left the pavement and the automobile turned over. Subsequently, Lois Madison instituted this suit against the father of Jack Essington, J. W. Essington, and Jack Essington to recover for injuries which she alleged she received in the accident.

Her amended complaint alleged that she was a ~~guest~~ guest passenger of the defendant, Jack Essington, and that at the time and place

aforesaid was in the exercise of due care for her own safety, that Jack Essington, having knowledge of the danger to the plaintiff, drove said car so willfully and wantonly along said highway at an excessive and unsafe rate of speed and contrary to the expressed wish and request of the plaintiff, that the automobile ran off the pavement and turned over and she was injured. She further alleged that J. W. Essington was the father of Jack Essington and the owner of the car and that at the time of the accident, Jack Essington was operating it as agent for his father. The defendants answered denying all the allegations of the complaint except that the plaintiff was riding as a guest in the car driven by Jack Essington upon the evening in question and that the car turned over and that the car belonged to J. W. Essington, the father of Jack Essington. At the conclusion of the trial, the jury returned a directed verdict in favor of J. W. Essington and as to the defendant, Jack Essington, the jury found him guilty and returned a verdict in favor of the plaintiff for $1500.00 upon which judgment was rendered and the defendant, Jack Essington, appeals.

Upon the trial, the plaintiff testified that at the time of the accident she was eighteen years of age, that on the evening of June 15, 1938, she, accompanied by Robert Green, rode with appellant as his guest, from Streator to Pontiac, a distance of twenty-seven miles in a Dodge five-passenger Sedan, that they left Streator about eight o'clock in the evening and all rode in the front seat, that at Pontiac they attended an open air dance and about eleven o'clock the same evening started upon their return trip to Streator. She further testified that she and Robert were sitting in the back seat and the defendant was driving, that after they left the city limits of Pontiac the pavement was straight and level and the defendant

drove along steadily at not less than sixty-five miles per hour. She stated that she based this opinion on the speed with which she observed objects were passing, that she had driven a car about one thousand miles and while not able to judge the speed accurately because she was unable to see the speedometer as she was sitting in the back seat, yet she gave it as her opinion that the car was proceeding at the rate of about seventy miles per hour. She further testified that about five or ten minutes after they left the city limits of Pontiac, she told the defendant that "her mother would like to have her home early but that she would rather have her a few minutes late and arrive in one piece, than in a dozen pieces." That in reply to this statement, the defendant asked her if she was trying to tell him how to drive. That thereafter nothing was said, and after about five minutes had elapsed after she had spoken to him, the car reached a curve in the road and turned over.

Robert Green was called as a witness by the plaintiff and testified that he was sitting in the back seat with appellee, that he did not know at what rate of speed the car was traveling after it left Pontiac but that he had driven a car since he was twelve or fifteen years of age and that he was twenty-two years of age at the time of the accident and did not observe anything unusual about the speed of the car before the accident or notice anything unusual in the way the defendant drove it. and that he didn't say anything to the defendant or hear the plaintiff say anything to the defendant about the speed of the car or anything else after they left Pontiac. He further testified that he didn't hear the plaintiff say what she testified she said to the effect that her mother would like to have her home early, but that she would rather have her be a few minutes late and arrive in one piece than in a dozen pieces.

The defendant testified that he was twenty-two years of age, had driven automobiles for many years and had frequently driven this car, that after leaving Pontiac he drove along steadily at about 55 miles per hour, that he looked occasionally at the speedometer and instrument board, and that a couple of minutes before the accident, he observed that the speedometer registered 55 miles per hour. He testified that he might have turned the radio on a short time before the accident, but that he was practically all the way around the curve in the road and his car was headed almost directly west when the right rear wheel slid off the pavement. That at this point, two gravel roads intersect the pavement and that there was gravel on the pavement, that when the rear wheel went off the edge of the pavement he lost control of the car and it turned over. Appellant states positively that appellee said nothing to him about the rate of speed he was driving and denies that she said anything to him about her mother wanting her to get home early but would rather have her arrive in one piece, than in a dozen pieces.

After the accident the three occupants of the car were conscious and were picked up by a passing motorist and taken to a hospital at Pontiac. They were examined and advised that no one was in a serious condition and they procured a taxi and were driven to Streator. When they arrived at Streator, they went to the hospital and Dr. Barickman, the family physician of the plaintiff was called and he dressed some bruises upon appellee's hand and leg and examined her for broken bones, but found none. She remained in the hospital four days and was discharged and went to her home on June 19th. The evidence further discloses that shortly after the accident, the plaintiff rode in an automobile being driven by the defendant several times. On one of these occasions, she rode with him from

Streator to Marseilles, a distance of about 25 miles, and on another night, a month after the accident, she rode with him from Streator to La Salle which is about 30 miles.

The evidence as to the rate of speed at which the car had been traveling before the accident and prior to reaching the curve is conflicting. From observing passing objects in the night time as she sat in the back seat of this car, appellee gave it as her opinion that the car was being driven seventy miles per hour. Appellant basing his evidence upon the registration of the speedometer, testified he was driving along the straight, level pavement fifty-five miles per hour. The only other person in the car at the time stated there was nothing unusual either in the speed of the car or the manner in which appellant was driving it, but because of his position in the car, said he was unable to state in miles per hour how fast it was traveling.

Other than the speed at which appellant was driving his car, there is nothingin this record to indicate an indifference upon the part of the driver of this car to his duty to his guests or an utter forgetfullness of their safety. In Clark v. Hasselquist, 304 Ill. App. 41, we said that excessive speed may or may not be evidence of willful and wanton misconduct. The determining factor is the circumstances surrounding such excessive speed. The uncontradicted evidence found in this record is that the car defendant was driving belonged to his father and that defendant had frequently driven it, that he is a young man about 22 years of age and had been driving automobiles for six years and was an experienced driver. He was familiar with the road and only a few hours before had driven the same car with the same passengers over this highway going to Pontiac. The car was in good mechanical condition and no other cars were on the highway within his range of vision. The pavement

was dry, the night was dark, his lights were burning. From Pontiac the pavement is level and runs straight north for a distance of eight miles when it turns west and it was after the car had practically completed this curve and was headed west that it reached the point where the accident occurred. At least two minutes had elapsed after he adjusted the radio before the accident happened and prior to the time he approached the curve and as he was driving around the curve, he was giving his undivided attention to his driving. There was some gravel on the pavement at the point where the right rear wheel left the pavement and in attempting to get his car back on the pavement, it turned over.

Appellant may have been traveling at a speed in excess of that at which a careful and prudent person would have driven, but the law is that to render him guilty of wanton conduct, it must have been proven by a preponderance of the evidence that, from his knowledge of the surrounding circumstances and conditions, appellant was conscious that his conduct in driving as he did, would naturally and probably result in injury to appellee.

Whether a personal injury has been inflicted willfully or wantonly is a question of fact to be determined by the jury and depends upon the circumstances of each particular case. The evidence as to the rate of speed is conflicting. According to the testimony of appellee, the only time she spoke to appellant was five or ten minutes after they left Pontiac and the accident happened five minutes later. The evidence is that the accident occurred eight miles north of Pontiac and that the road is straight and that the car proceeded without change in its rate of speed. If appellee is correct in her estimate of time and it took ten minutes to drive eight miles, then the average rate of speed must have been forty-eight miles per hour. In Schachtrup v. Hensel 295 Ill. App. 303 this court said at page 310:

was dry, the [illegible] the pavement is level and more [illegible] eight miles when it turns [illegible] only completed it is [illegible] point where the accident [illegible] after he adjusted the radio [illegible] to the time he [illegible] curve, he was driving [illegible] was some [illegible] wheel left the pavement [illegible] passenger, it [illegible]

Appellant [illegible] at which a cancel [illegible] law is that he [illegible] been driver by a [illegible] was a good [illegible]

[illegible]

[illegible] Bohner v. [illegible]

"It is common knowledge that drivers of cars on a straight paved road with an unobstructed view, drive approximately 50 miles an hour and many who drive in excess of that speed are considered careful drivers."

We have read all the evidence found in this record and under the circumstances shown to have existed at the time this accident happened, it seems strange that this driver would operate his car in so willful and wanton a manner as to be chargeable with the desire to injure the occupants of the very car of which he was the driver. This is contrary to the law of self-preservation. McGuire v. McGannon, 283 Ill. App. 293. We do not believe the evidence as shown by this record supports the verdict and judgment of the Circuit Court. Being of this opinion, it is unnecessary for us to comment upon the other errors relied upon for reversal.

The judgment of the Circuit Court of LaSalle County is reversed and the cause remanded.

Reversed and remanded.

"It is common [illegible] road with an unobstructed view, [illegible] bound and many the drive to circle [illegible] certain driving."

[illegible] have read all the evidence [illegible] the circumstances [illegible] the accident happened, it seems [illegible] in no vital [illegible] to blame [illegible] This is contrary [illegible] Johnson, [illegible] shown by this record [illegible] down. Going at this [illegible] upon the other [illegible]

The judgment [illegible] [illegible]

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

*Clerk of the Appellate Court*

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168 a

PUBLISHED IN ABSTRACT

**William W. Poor, Plaintiff-Appellee, v. B. C. Hopper, Defendant-Appellant.**

**Gen. No. 9243** 306 I.A. 626

MR. JUSTICE HAYES delivered the opinion of the Court.

This is an appeal from the Circuit Court of Christian County from a judgment for fifty ($50.00) dollars, in favor of William W. Poor, plaintiff-appellee, and against B. C. Hopper, defendant-appellant, for damages assessed by a verdict of a jury.

The defendant owned a tract of twenty acres of land, upon which his Mother resided, she being an elderly lady. The defendant lived just across the Highway from his Mother, on another tract of land. In the fall of 1937, plaintiff was engaged by the Mother (Mrs. Hopper) to fall plow six acres of the twenty acre tract, and was paid for this work by defendant's Mother. Plaintiff testified that at the time of the settlement with Mrs. Hopper for his labor, he rented the land from her for the farming year 1938.

The evidence is conflicting on just what occurred the following Spring. There is some evidence to show that Herschel Sparling, a hired man who worked for Mrs. Hopper, did some work on the land in question. Sparling prepared the land for seeding, and later came to the plaintiff and requested that he plant the corn. The record is confusing as to whether Sparling did this labor at defendant's direction, or at Mrs. Hopper's direction. It does appear, however, that the plaintiff did plant the corn, and plaintiff contends that he also cultivated it.

In the fall of 1938, plaintiff started to shuck the corn, claiming half the crop under the tenancy. He was stopped by Sparling, who took him to the defendant. Plaintiff testified that defendant said to him on that occasion, "I owe you for four or five days' work, but you cannot have half the crop." Defendant denied this, stating the undertaking was that of his Mother and not his.

The case was first tried before a Justice of Peace, where the plaintiff recovered a judgment for forty ($40.00) dollars. Defendant then appealed the case

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Ill. Unpublished Opinions
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| 3/23/77 | J. Berry |